

# Reform(aliz)ing Copyright

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## INTRODUCTION

The recent debate between those who oppose the current trend of expanding the duration and breadth of copyright control over creative works, and those who welcome it, has focused on large and abstract questions like the optimal duration of copyright,<sup>2</sup> whether extension of subsisting copyrights is constitutional,<sup>3</sup> the degree to which technology has either facilitated or inhibited control of copyrighted content,<sup>4</sup> and the effect that such control has on free speech, the public domain, and future creativity.<sup>5</sup> The

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<sup>2</sup> See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW*, ch. 8 (2004); Brief of George A. Akerlof, et al., as Amici Curiae in Support of Petitioners in *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003), filed May 20, 2002 (Economists' Brief).

<sup>3</sup> See, e.g., Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 Loy. L.A. L. Rev. 123 (2002); Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 Loy. L.A. L. Rev. 323 (2002); Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyright Soc'y U.S.A. 19 (2001).

<sup>4</sup> See, e.g., LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & Contemp. Probs. 33 (2001).

<sup>5</sup> See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004); R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 Colum. L. Rev. 995 (2003); LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001); Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law 1900-2000*, 88 Cal. L. Rev. 2187 (2001); Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law*, in *COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (Adam Thierer & Clyde Wayne Crews Jr., ed., 2002).

debate has produced an insightful literature, and a few creative (but thus far unsuccessful) lawsuits.<sup>6</sup> It has not, however, substantially altered the direction of recent developments in the law, which continues to move in the direction of increased control.

This article presumes that the trend toward greater control will continue. I will argue, however, that a few relatively modest and realistically implementable changes to the copyright laws could help address the legitimate concerns of the copyright critics. Curiously, it is relatively small changes to copyright procedure, and not to the substantive rights granted by copyright, that may allow the law to reach this desirable end.

**Copyright formalities.** For most of our history, Congress's copyright law has included a system of procedural mechanisms, referred to as "copyright formalities", that, as will be shown in greater detail, helped to maintain copyright's traditional balance between providing private incentives to authors and preserving a robust stock of public domain works from which future creators could draw. From the first copyright statute in 1790, Congress required that authors register their copyrights, give notice (by marking published copies with an indication of copyright status such as the "©" symbol, as well as other information about copyright ownership), and (perhaps most importantly) renew their rights after a relatively short initial term by re-registering their copyright. Failure to comply with these requirements either terminated the copyright (renewal) or prevented it from arising in the first place (registration and notice).

Taken together, these formalities created data about the existence and duration of copyright for the work in question, and about who owned the copyright. Formalities also facilitated licensing (by lowering the cost of identifying rightsholders), moved works for which copyright was not desired into the public domain, and encouraged the use of public domain works (by lowering the cost of confirming that a work was available for use).

**Deformalizing copyright.** However, in a process that began in earnest with the Copyright Act of 1976<sup>7</sup> and that culminated in successor legislation like the Berne Convention Implementation Act<sup>8</sup> and the Copyright Term Extension Act,<sup>9</sup> Congress pared back and, in some instances, entirely discarded copyright formalities. Under current law, copyright arises the moment an original piece of expression is fixed in a

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<sup>6</sup> See *Eldred v. Ashcroft*, 537 U.S. 186 (2003), *Golan v. Ashcroft*, No. 01-B-1854 (D. Colo. Complaint filed Feb. 18, 2003) (available at <<http://cyberlaw.stanford.edu/about/cases/Amended%20Complaint.pdf.pdf>>); *Kahle v. Ashcroft*, No. C04-01127 BZ (N.D. Cal. Complaint filed Mar. 22, 2004) (available at <<http://cyberlaw.stanford.edu/about/cases/Civil%20Complaint%203-22-04.pdf>>).

<sup>7</sup> Pub. L. No. 94-553, 90 Stat. 2572 (1976 Act).

<sup>8</sup> Pub. L. No. 100-568, 102 Stat. 2853 (BCIA).

<sup>9</sup> Pub. L. No. 105-298, 112 Stat. 2827-2828 (CTEA).

“tangible medium of expression”.<sup>10</sup> Registration and notice, though encouraged,<sup>11</sup> are not required as a condition of protection. Renewal is gone altogether.

Beginning in 1976, then, the U.S. moved from a “conditional” copyright system that premised the existence and continuation of copyright on compliance with formalities, to an “unconditional” system, in which a reduced set of voluntary formalities plays only a minor role. Richard Epstein has aptly characterized these changes as “copyright law . . . flipping over from a system that protected only rights that were claimed to one that vests all rights, whether claimed or not.”<sup>12</sup> That is a fundamental shift in any property rights regime, and one that, in the copyright context, represented a break with almost two centuries of practice. The advent of unconditional copyright has nonetheless generated little comment in the academic literature—perhaps because the very term “formalities” signals that the former requirements were trifling, ministerial, or more bothersome than helpful. To the extent the issue has been discussed at all, commentators have generally approved the trend<sup>13</sup> as a necessary predicate to U.S. accession to the Berne Convention for the Protection of Literary and Artistic Works.<sup>14</sup> The Berne Convention is the most significant international copyright treaty, and it includes a provision prohibiting signatories from imposing copyright formalities as a condition to the protection of works of nationals of other member states.<sup>15</sup>

**Reformatizing copyright.** This paper lays out a scheme for “reformatizing” copyright—i.e., for moving copyright back to a conditional regime—but in a way that accounts for developments in technology and that allows the U.S. to remain in compliance with its undertakings in the Berne Convention.

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<sup>10</sup> 17 U.S.C. 102.

<sup>11</sup> See *infra* at text accompanying notes \_\_\_\_.

<sup>12</sup> Epstein, *supra* note \_\_\_, at 124.

<sup>13</sup> See, e.g., Jane C. Ginsburg & John M. Kernochan, One Hundred and Two Years Later: The U.S. Joins the Berne Convention, 13 Colum.-V.L.A. J. Law & the Arts 1 (1988); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.01[B][1][a] (2000) (Berne’s “enlightened approach to copyright protection is notable for its antipathy to formalities . . .”). But see Lessig, Free Culture, *supra* note \_\_\_, at 250 (“Rather than abandoning formalities altogether, the response [of the Berne drafters] should have been to embrace a more equitable system of registration.”).

<sup>14</sup> Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 (hereinafter “Berne Convention”). All citations to the Berne Convention are to the “Paris Act”, adopted on July 24, 1971, unless noted otherwise. The Paris Act, to which the United States acceded on March 1, 1989, is the currently effective text of the Berne Convention.

<sup>15</sup> Berne Convention, art. 5(2).

Part I of this article describes the conditional copyright regime that characterized U.S. law for almost two centuries, and explores the role that formalities played in maintaining copyright's traditional balance.

Part II sets out the consequences of our post-1976 move away from conditional copyright and toward an unconditional system. In this part, I argue that formalities served an important role in filtering out of copyright works for which exclusive rights are not expected to provide a benefit to authors, thereby focusing copyright protection on works for which exclusive rights could be expected to add to the inducement to creative effort that is the primary justification for copyright.

The removal of formalities has had a profound effect on the nature and reach of U.S. copyright law. In fact, although the lengthening of the copyright term has attracted significant attention, and the removal of formalities almost none, the latter arguably represents the more significant change to the law, both in terms of expanding the domain of copyright beyond works for which application of the law is useful in inducing investment in creative works, and, consequently, in reducing copyright's social utility.

It is nonetheless still probably true that the elimination of mandatory formalities, at least in the particular forms that the law imposed before 1976, made sense given the circumstances (principally the need to gain admission to the Berne Convention) that faced Congress at the time. Very quickly, however, those circumstances have changed. The growth of the Internet, and, more broadly, of digital technologies, has opened up new possibilities for public access to and use of creative works that did not exist when Congress was removing formalities from copyright law. Before the digital age, the cost of copying and distribution had more effect on the ability of most people to access, use, and transform creative works than did the copyright laws. But now, digital distribution is cheap, and digital copying essentially free. Today, copyright law has emerged as the principal barrier to the creative re-use of a large amount of already-existing material that, under the former conditional copyright regime, would not have been subject to copyright in the first place. The majority of creative works have little or no commercial value (and the value of many initially successful works is quickly exhausted). For works that are not producing revenues, continued copyright protection serves no economic interest for the author. But in an unconditional copyright system, commercially "dead" works are nonetheless locked up: they cannot be used as building blocks for (potentially valuable) new works without permission, and the cost of obtaining permission will often prevent use. In such instances, copyright is radically unbalanced: its potential benefits are depleted, and it therefore imposes only social costs.

In Part III of this article, I explore how reformalizing copyright might restore the balance between incentives and access that the old conditional system maintained. The article does not, however, argue for the unilateral U.S. re-adoption of old-style formalities—such a move would fail because, among other reasons, it would cause the U.S. to fall out of compliance with the Berne Convention, thereby removing the U.S. from the international copyright system. Part III offers two alternative paths to reformalization:

***The Reciprocity Principle.*** The most direct route is to change the Berne Convention to permit—but not require—Berne nations to re-formalize their domestic copyright laws (and to apply those formalities to foreign as well as domestic works). Toward that end, I propose a revised text of the Convention that removes Berne’s current prohibition of formalities. In place of the previous ban, the revised Berne Convention would adopt a “reciprocity principle” requiring that all Berne jurisdictions that impose formalities (1) permit foreign authors to comply with formalities in their national laws by complying with formalities either in their home country or in the work’s country of first publication or registration; and (2) adhere to a set of standards set out in Berne that are designed to make different countries’ formalities “interoperable”.

These relatively small changes to Berne could, if properly implemented, support a system that allows authors (or publishers) to comply with formalities in every Berne Union nation simply by complying with formalities in their home country. Thus Berne nations would realize the benefits of reformatizing their domestic law, without creating significant transaction costs that would deter rightsholders from publishing their works in multiple jurisdictions.

***New-Style Formalities.*** It may be, however, that changes to the current text of the Berne Convention are not possible in the near term. That should not cause us to give up on formalities. Rather, that should lead us to ask whether we can formulate a set of “new-style” formalities that would capture as many of the benefits of the former system as possible, while not depending for their effectiveness on forfeiture of copyright. If formalities of this type could be reintroduced into U.S. law, they would nudge our copyright system back toward its utilitarian past while preserving our place in the international copyright system.

Toward that end, I propose a system of formalities that, although nominally voluntary, are de facto mandatory for any rightsholder whose work may have commercial value. Non-compliance with the new-style formalities I propose would subject works to a perpetual and irrevocable compulsory license, with royalties set at a very low level, thus effectively moving a work into the public domain. Although compulsory licenses are often criticized on the ground that they demand that a price be set for the rights at issue without a market mechanism to do so, the compulsory licenses that would be implemented in a set of new-style formalities would not be susceptible to this criticism. Rather than setting a price for the rights in a copyrighted work, these licenses would merely establish a threshold—i.e., that the rights were valuable enough to merit the relatively trivial investment required to comply with formalities.

As this paper shall argue, such a system of new-style formalities would replicate the important work that our pre-1976 conditional copyright system was able to do: namely, filtering commercially valueless works out of copyright and focusing the system on those works for which it could potentially do some good. Additionally, as we shall see, it is unlikely that a set of new-style formalities based on compulsory licenses would run afoul of the anti-formalities provision of the Berne Convention.

## I. THE TRADITIONAL CONTOURS OF “CONDITIONAL” COPYRIGHT

### A. Formalities in the Early Copyright Statutes

Viewed from the perspective of our current law, where copyright arises the moment a piece of creative expression is fixed in a tangible medium,<sup>16</sup> the early U.S. copyright laws are remarkable for the variety of hurdles that an author was made to clear to gain and maintain the protection of the law. The Copyright Act of 1790,<sup>17</sup> the first statute enacted under the authority established in the Constitution’s Intellectual Property Clause,<sup>18</sup> granted rights only to U.S. authors (and their executors, administrators and assigns) limited to the “printing, reprinting, publishing and vending” of their maps, charts, and books.<sup>19</sup> And the term of protection was quite short: the term of copyright in 1790 Act was 14 years, with a 14-year renewal if the author survived to the end of the initial term.<sup>20</sup>

Most importantly for present purposes, the 1790 Act also required compliance with a fairly demanding series of formalities, both as a condition precedent to receiving copyright protection, and then as a pre-requisite to maintaining protection past an initial term.

First, the 1790 Act conditioned protection on the author’s *registration* of his work with the clerk’s office of the district court where the author resided.<sup>21</sup> The registration condition applied to all works—even those previously copyrighted under pre-1790 state

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<sup>16</sup> See *supra* at text accompanying note \_\_\_\_.

<sup>17</sup> 1 Stat. 124 (1790) (the “1790 Act”).

<sup>18</sup> U.S. Const. art. I, s 8, cl. 8. This clause is often referred to as the Patent Clause, the Copyright Clause, or the Intellectual Property Clause. Although the term “intellectual property” was unknown at the time of the Constitution’s framing, and although the concept of intellectual property covers more ground than just patents and copyrights, I have chosen the third formulation to refer to the congressional power in this article, because it is the only formulation that captures in compact language both types of exclusive rights authorized in the clause.

<sup>19</sup> The 1790 Act gave authors no exclusive right to derivative works, or to public performance or display of their works.

<sup>20</sup> 1790 Act § 1.

<sup>21</sup> *Id.* at § 3.

copyright law. These works were required to be re-registered in order to gain federal protection.<sup>22</sup>

Second, within two months thereafter, the author was required to give notice of his copyright by publishing proof of registration in a newspaper for at least four weeks.<sup>23</sup> In 1802, in an enactment described as “supplementary” to the 1790 Act, Congress required, in addition to newspaper notice, that any author seeking to obtain copyright “give information” by marking each copy of his work with a prescribed copyright notice.<sup>24</sup> The statute required the same proof of registration published in the newspaper notice to be inserted in all published copies of books “at full length in the title page or in the page immediately following the title.” Marking according to the prescribed form was also required on all charts and maps. In all cases, the information required included the identity and location of the author, and the date of copyright.<sup>25</sup>

Third, the author was required to deposit a copy of the work, within six months of publication, with the Secretary of State.<sup>26</sup>

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<sup>22</sup> See William J. Maher, Copyright Term, Retrospective Extension, and the Copyright Law of 1790 in Historical Context, 49 J. Copyright Soc’y U.S.A. 1021, 1023 (2002). Interestingly, Maher’s examination of bibliographic records from the period 1790-1800 reveals that only 12 works subject to pre-existing state copyright law were re-registered under the 1790 Act—a tiny fraction (1.74%) of the works registered during that period. *Id.* at 1025. Moreover, at the time of their re-registration, only 3 of the works dated from before 1784. *Id.* Although 9 of the 12 states that had copyright laws prior to 1790 required works to be registered as a condition of protection, most of the state registration records from this period have been lost and it is, therefore, impossible to say how many works were registered under state copyright and were eligible for re-registration under the 1790 Act. See G. Thomas Tanselle, Copyright Records and the Bibliographer, 22 *Studies in Bibliography* 77, 82-84 (1969). Nonetheless, the very low absolute number of works re-registered following the 1790 Act (i.e., re-registration of works that were previously subject to state copyrights that were preempted by the 1790 Act) is consistent with much more expansive recent data, discussed *infra* at text accompanying notes \_\_\_\_, showing that copyrighted works have, on average, a short commercial life before their value is fully depreciated.

<sup>23</sup> *Id.*

<sup>24</sup> 2 Stat. 171 (1802).

<sup>25</sup> *Id.* at § 1.

<sup>26</sup> 1790 Act § 4. Responsibility for accepting registration and deposit was later moved to the Librarian of Congress, see 16 Stat. 212, §§ 85, 109-110 (1870).

Fourth, as previously mentioned, a surviving author was permitted to *renew* the copyright for an additional 14 years. Renewal required the author to re-register the copyright, and to publish proof of re-registration in a newspaper. Both actions were required to be taken within the final six months of the first term.<sup>27</sup>

Given the complexity of these formalities, the cost of compliance was not trivial, and the consequences of noncompliance severe. Failure to comply would result either in copyright failing to arise (registration), being unenforceable (notice, deposit), or subject to early termination and entry of the work into the public domain (renewal).

Thus, at its inception the American copyright system required compliance with a series of formalities that included registration, deposit, and notice via both marking and published announcement. The system also demanded re-registration (renewal) as a prerequisite for enjoyment of the full term of protection—a term which, it should be added, was very short judged from the perspective of today’s extended copyright terms.

This emphasis on formalities established in the Founders’ copyright statutes stayed almost entirely intact through the revisions of the copyright law enacted in 1831<sup>28</sup> and 1909.<sup>29</sup> The 1831 Act extended the initial term of copyright to 28 years,<sup>30</sup> but kept the registration, deposit, and notice requirements of the 1790 Act,<sup>31</sup> as well as the requirement that copyright owners renew their copyright to secure the benefits of a second term.<sup>32</sup> And in a supplemental enactment in 1834, Congress strengthened the registration requirement by requiring, for the purpose of maintaining an accurate record of copyright ownership, the *recording* of “all deeds or instruments in writing for the transfer or assignment of copyrights.”<sup>33</sup> The penalty for failure to record a transfer within 60 days was, as with noncompliance with any other formality, severe: the transfer would be judged “fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without notice.”<sup>34</sup>

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<sup>27</sup> 1790 Act § 1.

<sup>28</sup> 4 Stat. 435 (1831) (the “1831 Act”).

<sup>29</sup> 35 Stat. 1075 (1909), codified as 17 U.S.C. 1 et seq (repealed 1976) (the “1909 Act”).

<sup>30</sup> 1831 Act §15, 4 Stat. 439.

<sup>31</sup> *Id.* at §§ 3-5, 4 Stat. 437-48.

<sup>32</sup> *Id.* at § 2, 4 Stat. 436-37.

<sup>33</sup> An Act providing for the recording of assignments of copyrights, 4 Stat. 728 (June 30, 1834).

<sup>34</sup> *Id.*



Like the 1831 Act, the 1909 Act retained the registration,<sup>35</sup> notice<sup>36</sup> and renewal<sup>37</sup> requirements—though it lengthened the renewal term from 14 to 28 years<sup>38</sup> and softened the registration requirement somewhat.<sup>39</sup> And there copyright came to rest, until its major revision—and the beginning of the move from conditional to unconditional copyright—in 1976.

## B. From Conditional to Unconditional Copyright

Our former *conditional* copyright regime extended copyright protection only to those who took affirmative steps to claim copyright protection by registering their work, depositing it, marking it with notice of copyright, recording transfers, and renewing their rights at the end of an initial term

In contrast, our current *unconditional* copyright regime grants copyright protection to all “fixed” creative works, whether or not the author or his assigns takes any affirmative steps to claim copyright protection. Unconditional copyright grants protection whether or not the work is registered, deposited, marked, renewed, or assignments of the work recorded. In each instance, protection is automatic and indiscriminate, regardless of the will of the author or his assigns.

Beginning with the Copyright Act of 1976, which repealed the 1909 Act, we have moved quickly from a conditional to an unconditional copyright system. Today we have a statute that is unconditional. It grants copyright to all creative works at the moment of their fixation. Registration, deposit, notice and recordation, which used to be mandatory formalities, are now voluntary; noncompliance no longer affects the validity of the

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<sup>35</sup> 1909 Act § 1.

<sup>36</sup> *Id.* at §§ 10, 19-21.

<sup>37</sup> *Id.* at § 24.

<sup>38</sup> *Id.*

<sup>39</sup> The 1909 Act allowed protection to attach upon “publication or the work with the notice of copyright . . . .” *Id.* at § 10. Following publication, however, the Act required that the author “promptly” deposit copies of the work with the Copyright Office, and authors were required to submit an application for registration along with the deposit. *Id.* at § 13. Failure of an author to complete registration and deposit had severe consequences. First, the author was debarred from bringing a lawsuit for infringement of the copyright until he had complied with the registration and deposit formalities. *Id.* Second, the Register of Copyrights was authorized to make a demand for deposit, and failure to promptly comply (within three months from any part of the United States except for “outlying territorial possessions”, and within six months from anywhere else) would result in fines and the voiding of the copyright. *Id.* at § 14.

copyright. Lengthy copyright terms are granted to all works. Renewal is not required as a predicate to enjoyment of the full term.

### 1. *Voluntary Registration and Notice*

Of course, formalities have not disappeared entirely: current law relies on voluntary formalities and offers significant inducements to compliance. Registration creates a presumption of “constructive notice” that a work is under copyright,<sup>40</sup> which is very useful to a plaintiff in an infringement action. More broadly, registration is a pre-requisite to the initiation of an infringement action,<sup>41</sup> at least for works of U.S. origin. (Because a flat ban on enforcement of an unregistered copyright was believed to violate the Berne Convention,<sup>42</sup> there is no registration prerequisite to bringing suit for infringement of a work of foreign origin.) Current law also limits recovery of statutory damages and attorney’s fees to instances of infringement occurring after registration<sup>43</sup> and disallows the defense of innocent infringement for works imprinted with notice of copyright.<sup>44</sup> The law provides a somewhat weaker scheme to incent voluntary recordation of transfers of copyright ownership—recordation of transfers creates a presumption of constructive notice, but is not a pre-requisite to an infringement action and failure to record does not limit infringement damages.<sup>45</sup>

However substantial these inducements may be for owners of valuable copyrights who foresee the possibility of infringement litigation, they are not a replacement for mandatory formalities. The current system of voluntary formalities creates no incentive for compliance for the large number of rightsholders who do not expect their works to produce significant revenue: for these rightsholders, any disadvantage that noncompliance may create in infringement litigation is irrelevant.

Data on the rate of copyright registration confirm what logic suggests. Figure 1 graphs the annual number of registrations for the period 1910-2000.<sup>46</sup>

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<sup>40</sup> See 17 U.S.C. 410(c).

<sup>41</sup> 17 U.S.C. 411.

<sup>42</sup> See Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 Colum.-VLA J. L. & Arts 1, 60-61 (1986).

<sup>43</sup> 17 U.S.C. 412.

<sup>44</sup> See, e.g., 17 U.S.C. 401(d).

<sup>45</sup> See 17 U.S.C. 205. The law continues to require deposit, but punishes failure to comply with a fine, rather than with forfeiture of the copyright. 17 U.S.C. 407(d).

<sup>46</sup> Landes & Posner, *supra* note \_\_, at 236.

[INSERT as FIGURE 1 graph from L&P]

This graph, which has been taken from a study by William Landes and Richard Posner of United States Copyright Office data, shows that the gross number of registrations had been increasing sharply from the end of World War I through 1991. After 1991, however, the number of registrations stabilizes at a level approximately 20% lower than that reached in 1991, despite very significant growth in the overall economy between that year and 2000 (a rate of growth that doubtless was mirrored, if not exceeded, by the increase in the nation's "expressive output").<sup>47</sup> So the number of registrations should have continued to grow after 1991, perhaps at an even greater rate than it had in the prior decades, yet the number dropped in 1992 and has failed to increase since.

Some portion of these missing registrations is comprised of authors who, because they see no realistic prospect of commercial return from their works and do not foresee infringement litigation, are not moved by the law's current inducements to register. Under the pre-1976 conditional copyright system, these works would have moved immediately into the public domain, where they were usable without the need to ask permission, and could potentially serve as building blocks for future works that might find commercial success. In our post-1976 unconditional regime, however, many of these works are effectively dead. They are copyrighted, and therefore are usable only with permission. But the cost of obtaining permission is far from trivial. The would-be user first must locate a rightsholder, and then negotiate for rights. The cost of negotiating a license may be high when neither the licensor nor the licensee has any information from other market transactions that would help establish the value of a license. But many would-be users will never even get to the negotiation stage—the cost of identifying rightsholders, without the benefit of a registry, and often without any reliable indication of current ownership from the work itself (either because the work is not marked with notice or because rights have been transferred without recordation), will often be enough to deter the use.

Perhaps the best illustration of the difficulties users face in identifying rightsholders is the admission of the major record companies in the *Napster* litigation that they were unable to produce a complete list of the copyrighted works they claimed to own.<sup>48</sup> If record companies that are supposed to be sending out royalty checks are unable to quickly and cheaply identify their own works, the overall cost to users of doing so, especially in the case of works that are not commercially successful, is likely to be substantial. Indeed, it is not surprising that the record companies apparently invest so

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<sup>47</sup> Id. at 235.

<sup>48</sup> See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp.2d 896, 925 (N.D. Cal. 2000) (record companies contend "it would be burdensome or even impossible to identify all of the copyrighted music they own"), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001).

little in maintaining careful records of their back catalog: many of the works that they own are worth too little, in terms of expected future revenues, to merit the expense required to keep track of them. The situation in books is probably worse: a study by Lawrence Lessig of data in library and book annual catalogs suggests that only a tiny fraction of the total number of books ever published is still in print—for example, of 10,027 books published in the U.S. in 1930, only 174 (i.e., 1.7 percent) were still in print in 2001.<sup>49</sup> Publishing companies with enormous back catalogs of out-of-print books may find the cost of negotiating licenses for many uses outweigh expected revenues. Their back-catalogs, therefore, are effectively dead.

In sum, the transaction costs of unconditional copyright prevents many uses that otherwise may otherwise have been made. For unregistered works, then—and probably for many registered works as well<sup>50</sup>—the current system imposes costs, without producing countervailing benefits in the form of revenues to rightsholders.

## 2. *Renewal*

Unlike registration and notice, which live on as ghosts, the renewal term is well and truly dead. Under current law, all works dating from 1978 forward are protected for a “unified” term, which is currently set for individual works at life of the author plus 70 years, and for corporate and anonymous works at 95 years.<sup>51</sup>

[INSERT FIGURES 2 AND 3]

Figure 2 graphs the annual number of copyright renewals for the period 1910-2000; Figure 3 graphs the annual *rate* of copyright renewal—i.e., the number of renewals each year as a percentage of the total number of works for which the initial term was due to expire.<sup>52</sup> Both graphs show what one would expect: after renewal become automatic in 1992, both the total number and rate of renewals plummet.<sup>53</sup>

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<sup>49</sup> Landes & Posner, *supra* note \_\_, at 212.

<sup>50</sup> See *infra*, text accompanying notes \_\_\_\_.

<sup>51</sup> See 17 U.S.C. 302-04.

<sup>52</sup> These graphs are, like Figure 1, drawn from Landes & Posner, *supra* note \_\_, and are based on Copyright Office data collected by those authors.

<sup>53</sup> That renewals did not fall to zero is due to provisions of the North American Free Trade Agreement (NAFTA), Pub. L. No. 103-182, 107 Stat. 2057 (1993), and the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, tit. v., 514, 108 Stat. 4809, 4976 (1994), which together restored the copyright of certain foreign works that had fallen into the public domain for failure to comply with mandatory formalities. These foreign works are restored “for the remainder of the term of copyright that the

## II. FORMALITIES AND THE “TRADITIONAL CONTOURS” OF CONDITIONAL COPYRIGHT

### A. Recording Ownership

To understand the role that formalities have traditionally played in the copyright law, and the consequences of our move from conditional to unconditional copyright, it is helpful to think about formalities as they function in a different and perhaps more familiar context: real property.

When you buy a house, you record the transfer of title. You do so because the law requires you to, but if you take a moment to think about the reasons for the law, you will probably grasp fairly quickly that compliance is in your best interest. By recording your title, you will be able to prove your ownership when you eventually wish to sell the house. Indeed, you were probably only willing to buy it in the first place—and were able to convince the bank to grant you a mortgage—because you were able to confirm, through a title search, that the person who sold it to you actually held valid title and therefore had the right to convey the property.

In the case of real estate transactions, records of ownership are ordinarily maintained by local governments. The requirement that title be recorded is a form of government regulation, but no one complains, in this particular context, that government is interfering in the “free market” for real estate. For most people, their house is their biggest investment. Many would not be willing to make that investment without a clear record that the seller actually owns the house offered for sale. In this case, a regulatory scheme that creates a centralized record of ownership is a rational response to a fundamental characteristic of real estate—its expense, which makes would-be buyers uneasy unless ownership is transparent.

Formalities played an analogous role of recording ownership for the intangible form of property in literary and artistic works that we refer to as copyright. While the United States Copyright Office, which maintains the copyright registry, has never succeeded in making it as reliable or as easy to search as a typical real estate title registry, it was nonetheless the case that, back when registration was mandatory, the copyright registry did allow many would-be users of a creative work that might be covered by copyright quickly and inexpensively to determine whether the work in question is indeed subject to copyright, and, if so, from whom to seek a license.

As in the case of real estate, formalities have been implemented in the copyright context because they address a special characteristic of the particular type of property at issue. The property interest protected by copyright is intangible—unlike real estate or personal property, the property embodied in copyright has no unique physical existence. A painting, a book, a compact disk containing an audio recording; all are physical

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work would have otherwise been granted in the United States if the work never entered the public domain in the United States.” 17 U.S.C. 104A(a)(B).

objects, but the expression fixed in each of them may, absent the workings of the law, freely be copied and ownership of copies transferred. Therefore, although the question of who owns a particular copy of a book presents no more difficulty than does ownership of any particular piece of personal property, the question of who owns rights in the expression contained in the book most often cannot be answered simply by understanding who owns the book. The registration, notice and recordation formalities created the information about ownership that mere possession of a copyrighted work could not.

### 1. “Signaling”

Ownership in the copyright context may be less transparent than in the case of personal or real property, but the question of ownership is nonetheless a very important one to our copyright system, for at least two reasons. The first is that the rights granted by the copyright laws are, unlike rights in most other forms of property, temporary. Of the various limitations that the Constitution’s Intellectual Property Clause imposes on Congress’s power to grant copyrights and patents, none is more visible than the dictate that exclusive rights may be granted only for “limited times”. This limitation, and others in the clause, are designed to balance the need to give authors and artists incentives to create with the equally important imperative, in a society committed to free expression, that public access to creative works not be impeded by government-granted monopoly. So the author (or his assign) is given a period of exclusive ownership, during which he is free to profit from his work to whatever extent his exclusive right will allow. At the end of this period, however, the work reverts to the public, where it will be available as the raw material for future acts of creativity.

Of course, if this balancing act is to work, would-be users need to know when ownership of a copyrighted work began, and when it will end. Copyright formalities, by creating information about ownership and the term of protection—both at the inception of copyright (registration, notice), and later (recordation, renewal)—fulfilled the important function of signaling that works had moved from the private market to the public domain. As such, formalities were important in ensuring that the “limited times” requirement was operative at the level of individual works.

### 2. *Maximizing Private Incentives*

Ownership is also important for reasons that have to do not so much with maintaining the copyright balance, but with fully realizing the first element of that balance—i.e., incentivizing creation. Often, copyright owners profit by allowing others to exploit their works through licensing arrangements: indeed, because exploitation of creative works often requires significant investment that authors may be ill-placed to undertake, licensing is a crucial mechanism for transferring rights from authors to those entities, such as film studios, book publishers, and record companies, best able to exploit them.

Because licensing is efficient, intellectual property policy generally seeks to encourage it. Of course, licensing will be more prevalent if the transaction costs of

negotiating a license are low, and, historically, copyright formalities helped to lower the transaction costs of licensing. They did so by creating information about ownership and the term of protection, which simplified the process of identifying licensors and also clarified the length of the term of exclusive ownership that would be the subject of a license.

## **B. Formalities as a Copyright “Filter”**

Formalities constructed a record of ownership, but they served another, arguably even more important, function: they allowed authors and artists to distinguish between works for which they desired copyright protection and those for which they did not. Formalities performed this “filtering” function in two ways.

### *1. Registration and Notice*

Until the 1976 Act, the registration and notice requirements served as initial conditions for which noncompliance meant copyright either did not arise or was unenforceable. Although these initial obligations were easily satisfied, most published works were neither registered nor marked with copyright notice, indicating that the authors did not desire the protection that the copyright laws would otherwise provide—i.e., that they did not project a net present value for royalty revenue from their work which exceeded the relatively trivial costs of complying with the formalities. Thus the registration and notice formalities imposed an initial filter separating works with significant potential commercial value for which authors desired protection from other works for which protection was irrelevant. The latter class of works moved immediately into the public domain, where they were freely usable by others (most importantly, as the building material for new works) without fee or the need to ask permission. And because of absence of imprinted notice, the public domain status of many works was readily recognizable under the pre-1976 rules, even without the need to consult a registry.

How important was this initial filter? In an age where a popular book or record can return many millions of dollars for its copyright owner, it may be difficult to understand why a creator would fail to comply with inexpensive and relatively simple formalities and allow a work eligible for copyright to fall into the public domain. But the historical record suggests that non-compliance is the norm rather than the exception: in the days when registration was a prerequisite to copyright protection, most potentially copyrightable materials were not registered, and therefore were not protected by copyright.

Prior to the 1976 Act, all unpublished material was subject to perpetual common law copyright. The relevant question, then, is what percentage of *published* material was registered and made subject to copyright. The fact that a particular work was published suggests that it has some value, and that a relatively significant percentage of published works would be registered for the purpose of gaining protection under federal copyright. Yet, a 1987 study by James Gilreath and Elizabeth Carter Wills of records assembled by

the Library of Congress found that of the more than 15,000 maps, charts and books were published in the United States between 1790 and 1800, only 779 were registered and thus protected by copyright—a registration rate of approximately 5%.<sup>54</sup> William Maher, in a recent re-examination of the Gilreath and Wills study, finds that the earlier study made several errors that inflated the registration rate. Maher’s recalculation, using more complete bibliographic materials, suggests that the registration rate during that early period was even lower—3.28%.<sup>55</sup>

Some percentage of the published works were of foreign origin, and thus not eligible for protection under the 1790 Act, a fact that would tend to understate the rate of registration.<sup>56</sup> But even if the Gilreath/Wills and Maher studies offer only a rough approximation, they suggest that a small percentage, probably only between 5-10%, of works eligible for copyright protection, were registered in the decade following the original copyright act. And there is at least some evidence that the percentage of published works subject to copyright remained low, although probably not as low as at copyright’s inception. In a 1961 report to Congress, the Register of Copyrights stated that “most of the great mass of published material” did not bear a copyright notice, indicating that many authors were simply not interested in securing copyright at all.<sup>57</sup>

Copyright Office data on copyright registration also suggests that many authors do not project a significant net present value for their works, and consequently place a low value on copyright protection. Referring back to Figure 1, which graphs the annual number of registrations for the period 1910-2000, the data show that registrations more than quintupled during this period—reflecting both economic and population growth—but that the number of registrations peaked in 1991 and declined by almost 20 percent from 1991 to 2000. Landes and Posner argue that this decline is likely related to

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<sup>54</sup> See James Gilreath & Elizabeth Carter Wills, *FEDERAL COPYRIGHT RECORDS 1790-1800* (Library of Congress, 1987).

<sup>55</sup> See Maher, *supra* note \_\_\_, at 1024 n.8. Using additional information obtained from the *SUPPLEMENT TO CHARLES EVANS’ AMERICAN BIBLIOGRAPHY* (1970) about the number of works published in the United States, and correcting for duplicate copyright registrations in Gilreath’s records, Maher arrives at a larger number of published works (20,829) and a smaller number of copyright registrations (684).

<sup>56</sup> But probably not by much: working from Copyright Office registration data, Landes and Posner estimate that foreign works comprise only between 1 and 5 percent of U.S. copyright registrations. See Landes & Posner, *supra* note \_\_\_, at 239 n.42.

<sup>57</sup> Landes & Posner, *supra* note \_\_\_, at 235-36; see also H.R. Rep. No. 1476, 9<sup>th</sup> Cong., 2d Sess. (1976), at 143 (Copyright notice requirement served four principal functions: “(1) It has the effect of placing in the public domain a substantial body of published material that no one is interested in copyrighting; (2) It informs the public as to whether a particular work is copyrighted; (3) It identifies the copyright owner; and (4) It shows the date of publication.”.)



increases in the registration fee imposed during that period:<sup>58</sup> the fee increased from \$10 to \$20 in 1991, and increased again to \$30 in 2000. These relatively trivial increases in the cost of registration, and the contemporaneous changes in the rate of registration, represent a kind of natural experiment suggesting that, at the beginning of the copyright term, many authors place a low net present value—as low as \$20 or \$30, plus the similarly trivial cost of complying with the deposit, notice and renewal requirements—on their works.

The registration requirement thus encouraged authors to assess the value of their works prior to first publication. If the author expected the work to have a commercial value in excess of the time-adjusted cost of complying with registration and other formalities, he would take the steps necessary to obtain copyright protection. But if the costs of protection exceeded the expected revenues from copyrighting, the author would not register the work.<sup>59</sup>

In sum, this initial filter separating commercially valuable works from commercially valueless works helped focus the pre-1976 copyright regime in a way that maximized the incentive value of copyright while reducing the social costs. It makes sense to exclude from copyright the many works for which (in the author's judgment) protection was unlikely to provide more than trivial returns, for in those cases the primary effect of copyright would be to burden subsequent use, without countervailing private or public benefits.

In our current unconditional copyright system, we have discarded this initial filter, and, as a result, copyright burdens the creative process in ways that it did not before. For works that lack significant commercial value but nonetheless have some cultural significance—as, for example, an exemplar of some historical trend in politics, literature or the arts—unconditional copyright raises the cost of copying the work for non-commercial or scholarly uses by at least the value of the time spent identifying the rightsholder and seeking permission. An example would be an academic study of the

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<sup>58</sup> As Landes and Posner note, see n.\_\_\_\_ at 235 n.40, another factor potentially contributing to the decline in registrations may be that since 1989 registration has no longer been a condition for bringing an infringement suit for foreign works protected under the Berne Convention. Because foreign works constitute a small percentage of works registered in the U.S., however, the total exemption of foreign works from voluntary registration is a relatively unimportant determinant of registration rates.

<sup>59</sup> If an author (or, perhaps more relevantly, a publisher) foresees little commercial value for a particular work, that work may neither be registered nor published, in which case the federal copyright term would not commence under pre-1976 law, see 1909 Act, §§10, 11; rather, the work would have been subject to perpetual common law copyright. As noted earlier, under post-1976 rules, fixation in a tangible medium, and not publication, is now the trigger for copyright. See *supra*, text accompanying note \_\_\_\_.

advent and explosive growth of Internet “weblogging”.<sup>60</sup> Imagine that the author wishes to use a large number of weblog “posts” as source material for its analysis. Unless the subject weblogs signaled freedom of use through a Creative Commons license or the equivalent,<sup>61</sup> the academic who wanted to include a large number of weblog posts in his study would be obliged to clear rights to each post (or at least each post from which he wanted to draw more than limited quotations), or trust his fate to the vagaries of the fair use doctrine.<sup>62</sup> The burden of clearing rights for a large number of sources would make the academic project much more expensive.

Unconditional copyright also burdens potentially valuable transformative uses by raising the cost of using commercially valueless source material as building blocks for derivative works that take the original, improve on it, and find a market. Examples abound of derivative works that enjoy commercial success far surpassing their source material: one relatively recent instance is the song “Superman”, a hit in 1986 for the Athens, Georgia band R.E.M. “Superman” had originally been released in 1969 by The Clique, an obscure Houston, Texas group. The Clique’s version of the song was not a hit (in fact, it was the b-side to The Clique’s only hit single, “Sugar On Sunday”), and the band released only a single, eponymous album which, by the time R.E.M. recorded its cover, had long been “out of print”. Due, however, to the popularity of the R.E.M. cover

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<sup>60</sup> A weblog (sometimes shortened to “blog”) is a web site, usually of non-commercial origin, that uses a dated log format updated on a daily or very frequent basis with new information about a particular subject or range of subjects. Weblog content may be written by the blog’s owner, gleaned from other Internet or non-Internet sources, or contributed by users. A weblog may consist of the “postings” of the blog’s owner, or may accept posts from users.

For examples of popular weblogs, see “Slashdot”, <<http://slashdot.org>>, a user-driven blog focused on issues of interest to the programming community, or “TalkingPointsMemo”, <<http://talkingpointsmemo.com>>, the personal weblog of Joshua Micah Marshall, a Washington, DC journalist.

<sup>61</sup> Some weblogs do precisely that. See, e.g., “Baby and Baggage”, the weblog of appellate and intellectual property lawyer Denise Howell, at <<http://bgbg.blogspot.com/>>. See *infra* at text accompanying notes \_\_\_\_ for further discussion of Creative Commons.

<sup>62</sup> For a large and diverse set of examples of uses of copyrighted material that might conceivably be deemed “fair” but have nonetheless drawn allegations of infringement and demands to cease and desist, see <<http://www.chillingeffects.org/>>. The need for both would-be users and rightsholders to engage in expensive legal analysis of the four indeterminate factors that together comprise the statutory test for fair use, see 17 U.S.C. 107, is itself a cost imposed with significantly greater frequency in an unconditional copyright regime.

version of “Superman”, a compilation recording of The Clique’s work was re-issued in 1998.<sup>63</sup>

R.E.M.’s re-working of The Clique’s “Superman” was eased by the provision of our copyright law imposing compulsory licenses for “mechanical rights”—i.e., a compulsory license that gives artists the ability to record and distribute their own versions of musical compositions for a fee set by statute.<sup>64</sup> But for derivative works other than new performances of musical compositions, an author wishing to use even the most obscure and commercially valueless material must identify a rightsholder and ask permission. The necessity of identifying rightsholders and negotiating rights raises the cost of creating derivative works; consequently, output of potentially valuable derivative works will fall, in comparison to a conditional regime in which commercially valueless source materials were filtered out of the copyright regime at their inception.

Although the utility of the registration and notice formalities seems obvious, they have more often been viewed, on balance, as a hindrance. A 1904 report by the Register of Copyrights makes that point, lamenting that “a system has gradually grown up under which valuable literary rights have come to depend upon exact compliance with the statutory formalities which have no relation to the equitable rights involved, and the question may very well be raised whether this condition should be continued.”<sup>65</sup> Criticism of formalities and tales of hardship arising from accidental non-compliance abound in the historical copyright literature.<sup>66</sup>

There are two principal responses to the “unintentional noncompliance” objection to formalities. The first is that failure to comply with formalities is “endogenous”—i.e., failure to comply with mandatory formalities is evidence that the value of the work in

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<sup>63</sup> See

<<http://store.artistdirect.com/music/artist/bio/0,,415704,00.html?artist=The+Clique>>.

<sup>64</sup> See 17 U.S.C. 115. The compulsory license provision requires that notice be given to the licensor within 30 days of making the recording, and before any distribution. But, in a proviso that is especially relevant here, section 115(b)(1) provides that “[i]f the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention in the Copyright Office.”

<sup>65</sup> Report on Copyright Legislation by the Register of Copyrights (1904), at p. 25.

<sup>66</sup> See, e.g., Statement of Abraham L. Kaminstein, Register of Copyrights, before the Subcommittee on Patents, Trademarks, and Copyrights, 89<sup>th</sup> Cong., 1<sup>st</sup> Sess (Aug. 18, 1965), at p. 68 (“The present law [i.e., the 1909 Act] contains a number of highly technical requirements concerning copyright notice, registration, and deposit, and the recording of assignments which are not only burdensome and difficult to understand but which, in too many cases, result in complete loss of copyright protection.”).

question is less than the cost of educating oneself about and complying with a particular formality.<sup>67</sup> Because a person in possession of rights to a valuable work will be incented to educate himself about the steps required to perfect and maintain those rights, we need not concern ourselves about noncompliance—it is not evidence of a failure of the system of formalities, but a signal that the prospect of obtaining or maintaining rights in the work is not valuable enough to merit the required investment in compliance. Indeed, because formalities make sense, in part, as a filter separating commercially valuable from commercially valueless works, the cost of complying with formalities should be set at a level high enough to incent compliance only for those works valuable enough that the benefit of protection is likely to exceed the costs.

Of course, many would prefer that the decision whether to comply with formalities be an informed one, rather than an accident. The second response to the noncompliance problem proceeds from the assumption that we are not willing to ignore noncompliance as “endogenous”. The rate of noncompliance is dependent, to some extent, upon the difficulty of educating oneself about and then complying with a particular formality. Administering registration and renewal through simple on-line forms would lower the cost of complying with these formalities and reduce the incidence of unintentional noncompliance. Similarly, turning over the task of administering registration and renewal formalities to a number of private firms would, by sparking competition to expand the pool of consumers of “formalities-compliance services”, produce consumer information about compliance with formalities and further reduce the incidence of unintentional noncompliance. Lawrence Lessig has suggested that private provision of formalities-compliance services could be modeled on the current system for registering Internet domain names—i.e., a central registry maintained by government or a public-private partnership (like the Internet Corporation for Assigned Names and Numbers (ICANN),<sup>68</sup> which maintains the main top-level Internet domains (.com, .org, .net)), into which many competing registrars feed the data that is submitted by consumers (in the Internet context, firms like Stargate.com<sup>69</sup> and Network Solutions<sup>70</sup> compete to offer domain name registration services). As Professor Lessig notes, competition between competing registrars drives down the cost of registering an Internet domain name, and drives up the ease with which registration occurs.<sup>71</sup> There is no reason that competition couldn’t do the same in the context of compliance with copyright formalities.

There is one final observation (not exactly an objection) related to the filtering function of registration and notice. It might be argued that, even in our current

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<sup>67</sup> See Landes & Posner, *supra* note \_\_\_, at 238.

<sup>68</sup> See <<http://www.icann.org/general/>>.

<sup>69</sup> See <<http://www.stargateinc.com/>>.

<sup>70</sup> See <[http://www.networksolutions.com/en\\_US/](http://www.networksolutions.com/en_US/)>.

<sup>71</sup> See Lessig, *Free Culture*, *supra* note \_\_\_, at 289.

unconditional system, authors are free to dedicate their works to the public domain, and, therefore, rather than re-install formalities we should encourage public domain deeding as a method of filtering commercially valueless works out of copyright.

But dedication to the public domain is not a substitute for the filtering function that formalities formerly provided in a conditional copyright system. First, there is no provision in our current unconditional regime establishing rules for how dedication may be accomplished, and it has never been conclusively determined under current law that one may irreversibly dedicate a work to the public domain (dedication has, however, been judicially enforced under pre-1976 law).<sup>72</sup> Assuming dedication can be done, it must be accomplished by a license “to the world”; via, for example, a statement imprinted on all copies of a published work that “the author grants a nonexclusive right to any person to use this work in any way.” The process of dedication is thus the mirror image of compliance with registration and notice formalities. In a conditional system, a rightsholder must invest in compliance with formalities to obtain protection. In an unconditional system, a rightsholder must spend time and money on the process of dedication in order to disclaim protection. The conditional system relies on self-interest to filter commercially valueless works out of copyright. The dedication process in an unconditional system relies on altruism to do the same job, and has not yet been shown to be an effective mechanism.

To be clear, I do not mean to suggest that, in our current unconditional system, public domain dedication should not be encouraged: dedication is not a complete answer, but it can help, and new ways should be found to make the process more effective. Creative Commons, a project formed by a group of activists, academics, and content creators to give rightsholders choices about how their works may be used in addition to the “all rights reserved” default of the formal copyright law, has been active on this front.<sup>73</sup> Creative Commons provides a variety of “some rights reserved” licenses, including licenses allowing free use with attribution,<sup>74</sup> noncommercial use,<sup>75</sup> use without the right to make derivative works,<sup>76</sup> and use with the requirement that the user make freely usable by others any derivative work created using the original source material (referred to as the “share-alike” license,<sup>77</sup> similar in purpose to the “copyleft” movement’s Open

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<sup>72</sup> See, e.g., *Bell v. Combined Registry Co.*, 397 F.Supp. 1241 (N.D.Ill. 1975), *aff’d*, 536 F.2d 164 (1976) (holding that rightsholder “had [...] abandoned the copyright by authorizing others to use it without limitation (as a “gift” to the world)”).

<sup>73</sup> See <<http://creativecommons.org/learn/aboutus/>>.

<sup>74</sup> See <<http://creativecommons.org/licenses/by/1.0/>>.

<sup>75</sup> See <<http://creativecommons.org/licenses/nc/1.0/>>.

<sup>76</sup> See <<http://creativecommons.org/licenses/nd/1.0/>>.

<sup>77</sup> See <<http://creativecommons.org/licenses/sa/1.0/>>.

Software License<sup>78</sup> and GNU General Public License).<sup>79</sup> Creative Commons also provides a “no rights reserved” Public Domain Dedication license, which provides a perpetual and unconditional license “for the benefit of the public at large and to the detriment of the Dedicator's heirs and successors,”<sup>80</sup> as well as a “Founders’ Copyright” license, by which rightsholders agree to dedicate their work to the public domain after either a 14 or 28-year period.<sup>81</sup> I will return to Creative Commons later, as we consider how to build and implement new-style formalities.

## 2. *Renewal*

Until it was eliminated by the 1976 Act (for pre-1978 works) and the Berne Convention Implementation Act (for all other works), the renewal formality imposed another filter, one that operated later in the life-cycle of the copyrighted work as a “post-test” of commercial viability. A feature of U.S. law that originated with the founding (1790) copyright statute, the renewal formality required copyright owners to re-register their works at the end of a relatively short initial term of protection. Failure to re-register meant that the work moved into the public domain.

The effect of the renewal requirement was, again, to measure authors’ desire for protection. The mechanism was the same as that for the initial filter of registration, only it measured not whether a work had commercial value at its inception, but whether its value was enduring. Works that, at the end of the initial copyright term (first 14 and later 28 years) retained commercial value, were renewed. Authors would not bother, however, to renew works that had ceased to profit them at the end of the initial term, and for which they held no realistic expectation of future profit. Historically, approximately 15% of works have been renewed, meaning that 85% of works moved into the public domain—by consent of rightsholders—after a relatively short term of protection.

As in the case of registration, Copyright Office data on renewal rates suggest that many authors place a low value on continued copyright protection at the end of an initial copyright term. In a 1961 report based on data subsequent to the 1909 Act, the Register of Copyrights stated that, for the minority of published works that were registered and for which notice of copyright was given, less than 15 percent of all copyrights on these works were being renewed.<sup>82</sup>

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<sup>78</sup> See <<http://www.opensource.org/licenses/osl-2.0.php>>.

<sup>79</sup> See <<http://www.gnu.org/licenses/gpl.html>>.

<sup>80</sup> See <<http://creativecommons.org/licenses/publicdomain/>>.

<sup>81</sup> See <<http://creativecommons.org/projects/founderscopyright/>>.

<sup>82</sup> Barbara A. Ringer, *Renewal of Copyright*, in *STUDIES ON COPYRIGHT* 503, 616-20 (Arthur Fisher Memorial ed. 1963).

Landes and Posner, looking at Copyright Office data from 1910-2000, arrive at the same average rate of renewal—around 15%. Figures 2 and 3, reproduced above at p. \_\_\_, graph the annual number of renewals and the rate of copyright renewal, respectively, for the period 1910-2000.<sup>83</sup> The data show that the gross number of renewals grew by a factor of more than 10 between 1910 and 1991. But the percentage of works renewed remained low throughout the period. Working from the same data used by the Copyright Office, Landes and Posner estimate the rate of renewal at less than 11% for the period between 1883 and 1964, even though the renewal fee was trivial throughout this period.<sup>84</sup> The rate of renewal rose somewhat between 1980 and 1990, when it reached its single-year high of 22%. Beginning in 1992, however, the rate began to decline sharply; as noted above,<sup>85</sup> in 1992 renewal became automatic under the Berne Convention Implementation Act, and the decline in renewal was in large part driven by the elimination of renewal as a formality. But because the 1992 amendments did not eliminate all incentive to renew a work,<sup>86</sup> Landes and Posner argue that the decline in renewal is also likely to be related to increases in the renewal fee, which doubled to \$12 in 1991, rose to \$20 in 1993, and rose again to \$45 in 2000.

If the general rate of renewal is low, renewal rates of certain significant classes of works were even lower: the renewal rate for books has averaged less than 8%, and for graphic arts, approximately 3%.<sup>87</sup> The average renewal rate over this period for music is higher (32%),<sup>88</sup> as one would expect given the regularity with which even very old songs are re-worked with new performers and arrangements (as well as the existence of a compulsory license scheme allowing such re-workings to be made in exchange for a statutory royalty and without the need to ask for permission).<sup>89</sup> But the renewal rate even for music peaked in 1956 and fell steadily after that. By 1969, the end of the data period

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<sup>83</sup> Landes & Posner, *supra* note \_\_\_, at 236.

<sup>84</sup> The renewal fee was \$1 from 1909 to 1947, \$2 from 1948 to 1965, \$4 from 1966 to 1977, \$6 from 1978 to 1990, \$12 from 1991 to 1992, \$20 from 1993 to 1999, and \$45 from 2000 to the present. See Landes and Posner, *supra* n. \_\_\_, at 212 n.8; Robert A. Gorman and Jane C. Ginsburg, *COPYRIGHT: CASES AND MATERIALS* 356-57 (6<sup>th</sup> ed. 2002).

<sup>85</sup> See *supra* at text accompanying notes \_\_\_-\_\_\_.

<sup>86</sup> See *infra* at text accompanying note \_\_\_\_.

<sup>87</sup> See Landes & Posner, *supra* note \_\_\_, at 241-44.

<sup>88</sup> *Id.* at 243.

<sup>89</sup> See *infra* at text accompanying notes \_\_\_\_.

for renewals disaggregated by type of work, the renewal rate for music had fallen almost to the historical norm for all works of around 15%.<sup>90</sup>

In sum, the renewal data reinforces what the registration data suggests—that the difference between an unconditional and a conditional copyright system, in terms of the scope of the works each system reaches, is profound. In a conditional system, only a small portion of copyrightable works is valuable enough at inception to merit registration. And only a small portion of works retains enough value at the end of an initial term to merit renewal. Using Copyright Office registration and renewal data, Landes and Posner estimate an average annual depreciation rate for copyrighted works ranging between 5.4% and 12.2%,<sup>91</sup> which results in an average expected commercial life for copyrighted works that ranges from 8.2 to 18.5 years.<sup>92</sup> Working from copyrights registered in a single year, 1934, the authors estimate that 50% of the registered works had fully depreciated in just 10 years, 90% in 43 years, and 99% in 65 years.<sup>93</sup>

These findings are supported by the results of a 1998 study by the Congressional Research Service, which examined a sample of copyrights renewed after an initial term of 28 years. The CRS study concluded that only 11% of renewed copyrights in books, 12% in musical works, and 26% in motion pictures had some continuing commercial value.<sup>94</sup>

The high rate of depreciation, and the resulting low historical rate of copyright renewal, both underscore the utility of the renewal formality. At the end of a 28-year initial term, relatively few works enjoy any continuing commercial value. The necessity of renewing rights filters commercially valueless works out of copyright. But that is not the only benefit of renewal, for the process also allows a bit of further fine-tuning. If the cost of renewal is set at a level at least equal to the average cost to would-be users of clearing rights—a cost that is not currently known but that readily could be established<sup>95</sup> in a re-formalized system with a functional registry—works will be renewed and remain under copyright only if the expected benefit from continued protection exceeds the expected costs of negotiating a license.

### *3. Effect of the Renewal Formality on the Real Term of Copyright*

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<sup>90</sup> Id. at 242.

<sup>91</sup> Id. at 238-39.

<sup>92</sup> Id. at 240.

<sup>93</sup> Id.

<sup>94</sup> Edward Rappaport, Copyright Term Extension: Estimating the Economic Values, Congressional Research Service Report 98-144E (1998).

<sup>95</sup> At least prospectively, for works registered subsequent to re-formalization.



The renewal formality made the “real” term of copyright (in contrast to the nominal term set out in the copyright statutes) very short by our current standards. For the subset of works that were not eliminated by the initial (registration and notice) filter and were therefore subject to copyright, the longest effective copyright term prior to the 1976 Act, at an average renewal rate of 15%, was 32.2 years.<sup>96</sup> Using the highest historical renewal figure for all works, 22% (1990), the average term of copyright would be 34.1 years.<sup>97</sup>

Under our current unconditional copyright system, there is no longer any filtering mechanism tailoring the term of individual works, and, consequently, the real and nominal copyright terms have converged. The 1976 Act switched from a fixed term of years to a variable (or, more properly, indeterminate) term for works by individual authors: at first, life of the author plus 50 years, later extended by the CTEA to life plus 70 years. For corporate works—known in the argot as “works for hire”—and anonymous works, the 1976 Act fixed a term of 75 years from the date of publication or 100 years from creation, whichever expired first. The CTEA extended those terms to 95 and 120 years, respectively.

The copyright term is now sufficiently long that the net present value to the rightsholder of a copyright is barely distinguishable from what it would be under a perpetual term. In a brief *amicus curiae* submitted to the Supreme Court in support of petitioners in *Eldred v. Ashcroft*, a group of economists that included Nobel Prize winners George Akerlof, Kenneth Arrow, James Buchanan, Ronald Coase and Milton Friedman argued that the current, post-CTEA copyright term of life plus 70 years has a net present value that is 99.88% of the value of a perpetual term.<sup>98</sup>

That the copyright term is now effectively perpetual is an odd development in a country whose constitution specifies that copyrights may be granted only for “limited times.”<sup>99</sup> As will be discussed in greater detail later in this Article, copyright’s primary

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<sup>96</sup> Under pre-1976 law, the longest duration for both the initial and renewal terms was 28 years. Accordingly, using an renewal rate of 15%, the average term of copyright is as follows:  $0.15(56)+0.85(28)$ .

<sup>97</sup> Using the highest renewal figure of 22%, the calculation is  $0.22(56)+0.85(28)$ .

<sup>98</sup> See Economists’ Brief, *supra* note \_\_\_, at 8.

<sup>99</sup> I am indebted to Tim Phillips for pointing out to me just how odd. Correspondence between Madison, who crafted the Intellectual Property Clause, and Jefferson suggests that the Founders thought of the proper length of a limited copyright term in quite specific actuarial terms. Having resigned himself to the inclusion of a clause authorizing Congress to create copyrights and patents—a power he initially opposed as liable to lead to the creation of dangerous “monopolies”—Jefferson proposed in a letter (posted from France) of August 28, 1789 that copyrights and patents be limited in duration to a fixed term of years. A few days afterward, in a letter of September 6, 1789, Jefferson proposed a term of 19 years, based on an actuarial calculation:

justification in the United States, at least as it has been articulated historically, is as a means of ensuring that creators realize a large enough share of whatever revenue their works may produce to ensure that they are induced to invest in production of creative works. Copyright in the U.S. has tended to focus on this utilitarian justification, in contrast to a natural rights or “labor desert” paradigm that premises copyright on protection of the author’s right to the fruits of his intellectual labor, or to a moral rights paradigm in which copyright serves mainly to protect an author’s control over his identity (i.e., personality) as reflected in his creative works.<sup>100</sup> As Paul Goldstein and others have observed, although at the level of theory one might expect our utilitarian system to operate quite differently from systems in continental Europe that are purportedly based on a mixture of natural and moral rights justifications, in reality copyright systems in the developed world have converged, and now provide a set of protections that approach what one would expect under a natural rights paradigm.<sup>101</sup>

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The question Whether one generation of men has a right to bind another seems never to have been started on this [i.e., the European side] or our [American] side of the water . . . . [T]hat no such obligation can be so transmitted I think very capable of proof. I set out on this ground, which I suppose to be self evident, that the earth belongs in usufruct to the living; that the dead have neither powers nor rights over it . . . . A generation coming in and going out entire . . . would have a right on the first year of their self-dominion to contract a debt for 33 years, in the 10th for 24, in the 20th for 14, in the 30th for 4, whereas generations, changing daily by daily deaths and births, have one constant term, beginning at the date of their contract, and ending when a majority of those of full age at that date shall be dead. The length of that term may be estimated from the tables of mortality. Take, for instance, the tables of M. de Buffon . . . [according to which] half of those of 21 years and upwards living at any one instant of time will be dead in 18 years 8 months, or say 19 years as the nearest integral number. Then 19 years is the term beyond which neither the representatives of a nation, nor even the whole nation itself assembled, can validly extend a debt . . . . This principle that the earth belongs to the living, and not to the dead, is of very extensive application . . . . Establish the principle . . . in the new law to be passed for protecting copyrights and new inventions, by securing the exclusive right for 19 instead of 14 years.

A like computation using life tables from 1992 yields a Jeffersonian copyright term of between 30 and 35 years. (See Vital Statistics of the United States 1992, Volume II, Mortality, Part A, Public Health Service, Hyattsville, 1996, Section 6, Table 6-1.)

<sup>100</sup> See generally Justin Hughes, *The Philosophy of Intellectual Property*, 77 *Geo. L. J.* 287 (1988).

<sup>101</sup> See, e.g., PAUL GOLDSTEIN, *I COPYRIGHT* § 1.13.2 (2d ed., 2004 Supp.).

The ever-lengthening term of copyright is perhaps the best example of our system's convergence with natural rights. A natural rights-based system would not necessarily impose a perpetual term, but one that allowed the author to capture substantially all of the fruits of his labor—i.e., one in which the net present value of the term was virtually indistinguishable from a perpetual term. That is, as the economists' brief in *Eldred* shows, exactly the kind of term we now have in the U.S. system. But even as our notions regarding the optimal copyright term have shifted closer to the natural rights paradigm, the deeper rationale for the filtering function of copyright formalities is still relevant: requiring compliance with formalities helps to reduce the social costs imposed by granting exclusive rights in expression.

#### 4. *The Costs of Copyright*

##### a. *The Social Cost of Monopoly*

Any copyright system that grants exclusive rights, whether based in a utilitarian or natural/moral rights conception, imposes a number of different social costs. First, there is an obvious economic cost, which is a specific instance of the general problem of monopoly: if a particular creative work has a market value, exclusive rights will enable the creator to charge a supracompetitive price, with the consequence that access to the work will be denied to those who value it in excess of the competitive price, but less than the supracompetitive price that the monopolist is able to command.<sup>102</sup> Copyright, then, creates deadweight loss in markets for expression.

The monopoly costs of copyright, while very real for works that possess significant commercial value, are relatively unimportant to the commercially valueless or exhausted works that conditional copyright filtered out but unconditional copyright locks up. While an unconditional system keeps economically spent works under copyright, the persistence of exclusive rights can do little to raise the price of a piece of expression that is commercially valueless—the rightsholder, in such an instance, may have a monopoly, but he does not ordinarily have the power to demand a supracompetitive price.

##### b. *Copyright's Burdens on Speech*

Much more important, for our purposes, are the two types of “cultural” cost imposed by copyright. Copyright imposes a First Amendment cost inhering in the restrictions on free speech imposed when rightsholders are allowed to prevent copying of their work. The recent copyright dispute involving the Diebold corporation provides an example of a potentially significant First Amendment cost imposed by copyright. Diebold Election Systems, Inc. manufactures electronic voting machines. Sometime in early 2003, a hacker broke into Diebold's computer systems and stole a large number of internal emails and memoranda. Some of the stolen Diebold documents include discussions of software bugs in the Diebold voting machines and warnings that the machines may produce

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<sup>102</sup> For a more fully developed account of the benefits and costs of copyright, see Linda R. Cohen and Roger G. Noll, *Intellectual Property, Antitrust and the New Economy*, 62 U. Pitt. L. Rev. 453 (2001).

unverifiable results and are poorly protected against hackers.<sup>103</sup> In August, 2003, an unknown person mailed approximately 13,000 pages of the stolen data to a number of activists concerned with electronic voting, many of whom published the Diebold emails and memos, or linked to those documents, on their web sites.

In response, Diebold sent dozens of cease-and-desist notices, pursuant to the “notice and take-down” provisions of the Digital Millennium Copyright Act,<sup>104</sup> to website publishers and ISPs demanding that they remove the documents from websites, and cease linking to the documents. Two recipients of the Diebold letters, a group of Swarthmore College students and an ISP providing pro bono Internet hosting to non-profit organizations, filed suit seeking a declaratory judgment that their publication of the Diebold documents is lawful.

The Diebold case is still pending as of this writing, but the result is less relevant for our purposes than what the facts of the case say about the free speech costs of unconditional copyright. Clearly, copyright incentives have little to do with whether Diebold creates the type of corporate documents at issue in this case: Diebold’s employees and contractors create and distribute these documents in the ordinary course of Diebold’s business, and they will continue to do so without regard to their copyright status. In our unconditional copyright system, where the Diebold documents gain automatic copyright protection at the moment of their fixation, the only function of copyright is to allow Diebold to inhibit public discussion of whether its voting machines are reliable. In contrast, in a reformatized system, most of the Diebold documents likely never would be subject to federal copyright in the first place (because Diebold does not expect to profit from the content itself, it almost certainly would not invest in compliance with formalities) and consequently Diebold would be unable to use copyright law as a means of limiting discussion regarding an issue of the highest public concern.<sup>105</sup>

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<sup>103</sup> For factual background, see the Amended Complaint, available at [http://www.eff.org/Legal/ISP\\_liability/OPG\\_v\\_Diebold/First\\_Amended\\_Complaint.pdf](http://www.eff.org/Legal/ISP_liability/OPG_v_Diebold/First_Amended_Complaint.pdf) >.

<sup>104</sup> The Digital Millennium Copyright Act (DMCA), passed by Congress in 1998, provides a “safe harbor” provision as an incentive for ISPs to take down user-posted content when they receive cease-and-desist letters such as the ones sent by Diebold. See 17 U.S.C. 512(c). By removing the content, or forcing the user to do so, for a minimum of 10 days, an ISP can immunize itself from any copyright claim.

<sup>105</sup> Note that under the pre-1976 regime, where federal copyright commenced upon “publication” and perpetual common law copyright applied to unpublished works, Diebold’s unpublished corporate memoranda would likely be subject to common law copyright and Diebold would still have a powerful copyright lever. (I say “likely”, rather than “certainly”, because the pre-1976 rules determining what constituted “publication”—the trigger that terminated state common law copyright and moved a work (upon compliance with formalities) into the federal system—were the subject of substantial debate and confusion. See William S. Strauss, *Protection of Unpublished Works*, in *STUDIES ON COPYRIGHT* 8-15 (Arthur Fisher Memorial ed. 1963). In contrast,

The Diebold disputes shows us that by bringing within the scope of copyright a huge number of works for which its incentive system is irrelevant, our unconditional system makes the potential conflict between copyright and the First Amendment much more severe.<sup>106</sup> This is an important point that no court has ever addressed, but which is quickly becoming salient.

c. Copyright “Buffering” Doctrines and the First Amendment

When considering the potential friction between copyright and the First Amendment, courts (including the Supreme Court in *Eldred*) have often pointed to two doctrines, the idea/expression dichotomy and the fair use defense, that act as buffers preventing copyright from interfering unduly with free speech. Because copyright protects only expression, courts have reasoned, ideas remain free for others to discuss and build upon. And because it is sometimes important, in talking about an idea, to use a particular bit of expression that may be protected, the fair use doctrine operates to allow the use of portions of a protected work for purposes—chiefly academic and journalistic criticism, and parody—that are considered necessary to maintaining the vibrancy of political and cultural debate.

Although the *Eldred* Court was not entirely clear on the point, its opinion suggests that these doctrines are the “traditional contours” of copyright that, left untouched, suffice to protect copyright’s cohabitation with the First Amendment.<sup>107</sup> But the Court’s reliance on these doctrines is almost certain to come under increasing strain. The idea/expression dichotomy makes perfect sense for one medium, written text, where the separation of idea from expression is relatively straightforward. But idea/expression never applied particularly well to non-textual media, such as music or graphic arts, where the “idea” is difficult, if not impossible, to separate from the expression. As technology shifts creativity toward new media that focus on “re-mixing” or “mashing up” bits of film, text, music, and graphic arts, we can expect to see fewer instances where the idea/expression dichotomy can do much to insulate re-use of existing work from infringement liability.

The same dynamic is now undermining the fair use doctrine. In the old media world of paper books, celluloid films, magnetic videotapes, and vinyl recordings (or even, until recently, unencrypted CDs), one gained the ability to make a fair use simply by acquiring a copy of the work—because there were exceedingly few analogs, in the analog world, to

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under a reformed version of our post-1976 system, where federal copyright arises upon fixation and common law copyright has been eliminated, the Diebold memoranda would almost certainly never enter the copyright system.

<sup>106</sup> See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995) (copyright used to prevent dissenters from distributing Church of Scientology materials). See also Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 Yale L. J. 1 (2002).

<sup>107</sup> 537 U.S. at 220.

today's digital encryption and rights management technologies, one was granted access by virtue of possession. But in the digital environment, possession does not necessarily imply the ability to make fair uses. Digital works are often encrypted, and the Digital Millennium Copyright Act (DMCA)<sup>108</sup> imposes civil and criminal penalties for the use—or even the distribution—of technologies designed to circumvent access and copy controls protecting copyrighted works.<sup>109</sup> Courts in cases like *Universal City Studios, Inc. v. Corley*<sup>110</sup> have held that the right of fair use does not imply a right of access to copyrighted works that may be required to make a fair use.<sup>111</sup> That holding threatens to make fair use a mirage as technology shifts creativity from analog to digital media. Whereas questions of access in the analog world only come up when the access sought is to *someone else's property*—how could it be otherwise, since possession of analog materials necessarily entailed access to make a copy?—the issue we confront now in the digital world is access to *one's own* property for the purpose of making fair uses. Put that way, a right of access does not seem much of a leap. So to say that there is no judicially-established right of access to make fair uses of copyrighted materials is not to say much. In the analog world we lived in until (at least in the timeframe of the law) only yesterday, the question simply never came up.

For the moment, however, it is clear that if fair use in the digital environment depends on fair access, the opportunities to make fair uses in a world of strong (and legally enforced) encryption are going to be substantially restricted. As with the idea/expression dichotomy, the shift from the analog to the digital environment has altered (i.e., has *constricted*) the “traditional contours” of the fair use doctrine. In the case of fair use, however, the constriction is worse, because it is not simply the product of shifting technologies, but of government action—i.e., the DMCA, which prohibits circumvention without providing any exception for fair use access.

So if idea/expression and fair use have been enfeebled, are there other “traditional contours” of copyright that remain vigorous enough to mediate between copyright and the First Amendment? There is—or, more properly, was—a third “buffer” that played a very significant role: copyright formalities. Under conditional copyright, formalities served to limit copyright protection to works that had independent value as expression. Works that lacked expression value ordinarily would not be copyrighted. The purpose of copyright is to incent expression *ex ante*; not to serve as a locking mechanism *ex post*. Copyright formalities created an incentive structure that aligned the material protected under copyright with the overarching justification for the regime. With the disappearance of formalities, perversions of copyright like we observe in Diebold become not only possible, but inevitable.

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<sup>108</sup> Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

<sup>109</sup> See 17 U.S.C. 1201.

<sup>110</sup> 273 F.3d 429 (2d Cir. 2001).

<sup>111</sup> *Id.* at 458-59.

d. *Copyright's Burden on Creativity*

In addition to burdening free speech, copyright also imposes costs on future creativity by shrinking the stock of pre-existing materials available to future creators for use as building blocks in new works, which reduces consequentially the production of new works.<sup>112</sup> Unlike the monopoly problem, copyright's toll on future creativity arises regardless of whether a particular work has a market value.

Individual acts of intellectual creativity may begin with a blank piece of paper, but the creative process itself is cumulative—every creative work builds on materials that already exist in the culture. Restraints on the ability to copy an entire work are likely have only marginal effects on the creation of future works: although many creative works refer to previous works, such reference rarely involves literal copying of the entire predecessor work. But copyright reaches further than wholesale, literal copying. Copyright allows a rightsholder to restrain works that contain elements “substantially similar” to any more than a trivial portion of the rightsholder's work.<sup>113</sup> In addition, the law gives the rightsholder control over derivative works—i.e., works that involve the transformative re-use of original (and therefore protected) elements of the rightsholder's work.<sup>114</sup>

The costs of copyright that we have just reviewed are substantially higher in an unconditional copyright system. Formalities, as least as they operated in the conditional copyright system that existed before 1976, minimized the costs of exclusive rights while retaining all or virtually all of the benefits. They did so by focusing the protections of copyright on those works that were judged by their authors, first at their inception and then again after an initial period of protection, to be the kind of commercially valuable creative material that could, if protected by copyright, potentially provide a return to their author. For these works, the incentive effect of copyright was potentially large enough to justify the cost of protection. But for works that were not expected to provide a return for their authors, protection involves only potential costs. Protection for works that authors judge commercially valueless—i.e., the majority of works—is a net loss for social welfare.

**C. Formalities and “Utilitarian” Copyright**

In addition to their role in focusing copyright (i.e., filtering) and creating ownership information, there is a deeper justification for formalities which ties together much of what has just been said: formalities are an important component of our original

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<sup>112</sup> See Posner and Landes, *supra* n \_\_\_\_ at pp. 58-60 (providing examples of transformative use of pre-existing materials in works of Shakespeare, Yeats, and Eliot, among others).

<sup>113</sup> See Goldstein, *supra* note \_\_\_\_, at § 7.2.1.2.

<sup>114</sup> See Goldstein, *supra* note \_\_\_\_, at § 7.4.1.1.

constitutional commitment to a utilitarian model of copyright. As we have moved closer to a natural rights paradigm in our copyright practice, the foundations of American copyright at both the constitutional and statutory levels have been obscured. But the original commitments are still there, awaiting the right plaintiff to revive them.

### 1. *The Intellectual Property Clause*

Why did the “traditional contours” of pre-1976 U.S. copyright law require compliance with so many bothersome formalities? In order to understand the role of formalities in our pre-1976 conditional copyright system, it is helpful first to look at the source of Congress’s authority to enact copyright laws, the Constitution’s Intellectual Property Clause. The clause does not itself require that Congress install any particular formality in copyright laws. Yet it reflects an original understanding of the purpose of copyright that led, in the early copyright statutes and for almost two centuries thereafter, to a system that relied heavily on formalities.

Article I, § 8, clause 8 of the United States Constitution confers upon Congress authority:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

As the Supreme Court has recognized, the Intellectual Property Clause is “both a grant of power and a limitation.”<sup>115</sup> But aside from formulating that aphorism, the Supreme Court has done little to limn either the power or the limitation, or to define the judicial role in ensuring that Congress’s copyright lawmaking remains within the boundaries set out by the clause.

The most significant continuing dispute in the interpretation of the Intellectual Property Clause involves the most basic question of interpretation: which part of the clause sets out the enumerated power? Edward Walterscheid has argued that the grant of power resides in the “promote . . . Progress” language, and that that power, moreover, is a general one that authorizes Congress to undertake a variety of schemes, such as the funding of medical research or grants to arts organizations, with the common purposes of encouraging discovery and spreading culture. Walterscheid contends that the second part of the clause (the “exclusive Right[s]” language) was added only for the purpose of making clear that, subject to certain limitations, Congress was authorized to grant patents and copyrights as part of its general power to advance learning.<sup>116</sup>

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<sup>115</sup> *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

<sup>116</sup> Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 *IDEA* 1 (2002).



More often, however, it has been argued that the power resides in the “exclusive Right[s]” part of the clause. According to this interpretation, the power granted is specific—i.e., Congress is authorized to grant limited-time exclusive rights, for the purpose of advancing learning. The federal government’s general power to “promote . . . Progress” through other means, if it exists at all in the Constitution, must reside elsewhere.<sup>117</sup>

Questions also remain regarding how the clause limits Congress’s exercise of its power. The clause limits the copyright grant to the “writings” of “authors”—by virtue of these limitations, there can be no grant of exclusive rights in ideas (as opposed to expression), and no grants to publishers. There is also, as mentioned previously, the “limited times” requirement.

The clause also imposes a more general limitation. In its opinion in *Eldred v. Ashcroft*, the Supreme Court announced that the “promote . . . Progress” phrase functions as a limitation on Congress’s power to enact copyright laws: “The constitutional command,” the *Eldred* Court stated, “is that Congress, to the extent it enacts copyright laws at all, create a system that ‘promotes the Progress of Science.’”<sup>118</sup>

The Court’s statement in *Eldred* provides no guidance regarding how judges are to determine whether one of Congress’s copyright enactments fails to promote progress. Nonetheless, even the bare statement in *Eldred* undercuts previous views that the “promote . . . Progress” language is merely a statement of purpose that functions neither as part of the congressional power, nor as a limitation of it.<sup>119</sup> More importantly, the Court’s statement in *Eldred* aligns its reading of the clause in the copyright context with its long-established approach in patent cases. In the patent context, the Court has long

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<sup>117</sup> See, e.g., David P. Currie, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* 93 (1997) (clause confers “not a general power ‘to promote the progress of science and useful arts’, but instead only the power to grant limited exclusive rights to accomplish that goal”).

<sup>118</sup> 537 U.S. at 212 (internal quotations and citations omitted).

<sup>119</sup> See *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981) (introductory language does not limit congressional power); *Mitchell Bros. Film Group v. Cinema Adult Theatre*, 604 F.2d 852, 860 (5<sup>th</sup> Cir. 1979) (same); Melville B. Nimmer & David Nimmer, 1 *Nimmer on Copyright* § 1.03 at 1-88 (promote progress phrase “is in the main explanatory of the purpose of copyright, without in itself constituting a rigid standard against which any copyright act must be measured”). Cf. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (Suggesting, in dicta, that the “promote . . . Progress” language may inform the meaning of otherwise ambiguous statutory language: “When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose.”).

held that the “promote . . . Progress” language imposes a judicially enforceable constraint on Congress’s power.<sup>120</sup>

If the Supreme Court has left basic questions of textual interpretation unsettled, it has been relatively clear and consistent on an even more basic interpretive issue raised by the Intellectual Property Clause: the theoretical foundation of intellectual property rights. It has long been established—at least at the level of judicial rhetoric—that copyright is not a natural right, but one created by positive law.<sup>121</sup>

a. *Wheaton v. Peters*

The Supreme Court established that principle in the 1834 case of *Wheaton v. Peters*.<sup>122</sup> In that case, Wheaton, the first reporter of decisions of the Supreme Court, sued Peters, his successor, alleging that a set of condensed volumes of Supreme Court opinions (Wheaton’s Reports) that Peters had published infringed Wheaton’s copyrights. In opposition, Peters pointed out that Wheaton could not assert a valid copyright in the Court’s opinions, which is what Peters had re-published.<sup>123</sup> The Court agreed with Peters,<sup>124</sup> and could simply have dismissed Wheaton’s case on this ground. But it dealt with this potentially dispositive issue in the last paragraph of its opinion, choosing instead to focus on the much more difficult alternative defenses Peters had raised: (1) that Wheaton could only claim copyright in his published works under federal law, as the right did not exist at common law,<sup>125</sup> and (2) that Wheaton’s failure to timely deposit his volumes with the Secretary of State, and to give public notice in a newspaper of that

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<sup>120</sup> See *Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 154 (1951) (Douglas and Black, JJ., concurring) (“Congress acts under the restraint imposed by the statement of purpose in Art. I, s 8.”); *Graham*, 383 U.S. at 5-6 (“Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose.”).

<sup>121</sup> For a comprehensive summary of the natural rights, utilitarian, communitarian, and other theories of intellectual property, see Justin Hughes, *The Philosophy of Intellectual Property*, in *INTELLECTUAL PROPERTY: MORAL, LEGAL AND INTERNATIONAL DILEMMAS* 107 (Moore ed. 1997).

<sup>122</sup> 33 U.S. (8 Pet.) 591, 657 (1834). But see Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 147 *Revue Internationale du Droit D’Auteur* 125 (1991).

<sup>123</sup> 33 U.S. at 619.

<sup>124</sup> *Id.* at 668.

<sup>125</sup> *Id.* at 625.

deposit, vitiated any copyright he might otherwise hold under the copyright acts of 1790 and 1802.<sup>126</sup>

The Court upheld both of Peters' defenses, holding that the author's copyright in his published works is created by statute and does not exist at common law.<sup>127</sup> Wheaton argued that the use of the phrase "securing . . . exclusive rights" in the Intellectual Property Clause and "securing [to authors] the copies of maps, charts and books" in the founding copyright statute indicated that both the Constitution and the 1790 Act were "securing" to authors a right that already existed at common law, and that continued to exist.<sup>128</sup> The Court rejected that argument: both the clause and the 1790 Act, the Court stated, refer to inventions (i.e., patents) as well as literary works, and "it has never been pretended, by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented."<sup>129</sup> Neither the clause nor the 1790 Act provided any reason to distinguish between the source of the exclusive right for inventions versus literary works. The Court also found, in a passage notable more for its forcefulness than its logic, that the language of the 1790 Act established that Congress was creating a right, not sanctioning an existing one:

That Congress, in passing the act of 1790, did not legislate in reference to existing rights, appears clear, from the provision that the author, &c 'shall have the sole right and liberty of printing', &c. Now if this exclusive right existed at common law, and Congress were about to adopt legislative provisions for its protection, would they have used this language? Could they have deemed it necessary to vest a right already vested. Such a presumption is refuted by the words above quoted, and their force is not lessened by any other part of the act.<sup>130</sup>

Having found that copyright in published works was a right created by statute, the Court held that non-compliance with the statutory pre-requisites—including those, such as deposit and notice, performed subsequent to publication—vitiates the copyright:

[T]he inquiry is made, shall the non performance of these subsequent conditions operate as a forfeiture of the right?

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<sup>126</sup> Id. at 634.

<sup>127</sup> Id. at 657 ("The argument that a literary man is as much entitled to the product of his labor as any other member of society, cannot be controverted. And the answer is, that he realizes this product by the transfer of his manuscripts, or in the sale of his works, when first published.").

<sup>128</sup> Id. at 660-61.

<sup>129</sup> Id. at 661.

<sup>130</sup> Id. at 661.

The answer is, that this is not a technical grant of precedent and subsequent conditions. All the conditions are important; the law requires them to be performed; and, consequently, their performance is essential to a perfect title.<sup>131</sup>

Facing an incomplete factual record, the Court remanded to the circuit court for a determination whether Wheaton had complied with the deposit and notice formalities.<sup>132</sup>

b. *Utilitarian Copyright*

If the Supreme Court in *Wheaton v. Peters* made clear that copyright is established by law, rather than merely enforced by it, then the obvious question is for what purpose has the right been established? Uniquely among the legislative powers enumerated in Article I, section 8, the Intellectual Property Clause ties the power to grant patents and copyrights to a specified purpose—the promotion of progress in “science” (by which the framers meant all forms of knowledge, including literature and the arts), and the “useful arts” (by which the framers meant patentable inventions). The justification for copyright (and patent) set out in the clause is utilitarian: Congress is authorized to create exclusive rights not as an end in itself, but merely as a means of “promoting progress”. The creation of exclusive rights will induce investment in literary, artistic and scientific work, by, as Abraham Lincoln put it, “add[ing] the fuel of interest to the fire of genius.”<sup>133</sup> Whether granting exclusive rights is the means best suited to that end is one of the large questions that has produced an interesting debate but is left aside in this Article.

In its occasional encounters with the Intellectual Property Clause, the Supreme Court has spoken in the utilitarian language of incentives and access—though, as Stewart Sterk has pointed out, the Court’s rhetoric has not been entirely consistent.<sup>134</sup> In *United States v. Paramount Pictures*, the Court wrote that “[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration . . . . It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.”<sup>135</sup> In *Mazer v. Stein*, the Court wrote that “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public

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<sup>131</sup> 33 U.S. at 664-65.

<sup>132</sup> *Id.* at 667.

<sup>133</sup> Abraham Lincoln, Lectures on Discoveries and Inventions (Jacksonville, IL, Feb. 11, 1859), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 10-11 (Don E. Fehrenbacher, ed., 1989).

<sup>134</sup> See Stewart E. Sterk, Rhetoric and Reality in Copyright Law, 94 Mich. L. Rev. 1197, 1203 (1996); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“[S]acrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.”).

<sup>135</sup> 334 U.S. 131, 158 (1948).

welfare through the talents of authors and inventors . . . .”<sup>136</sup> In *Sony Corp. v. Universal City Studios*,<sup>137</sup> the Court wrote that the exclusive rights granted under the copyright laws “are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward.”<sup>138</sup>

So at least at a high level of generality—i.e., in the Supreme Court’s *obiter dicta* on copyright’s overall purpose—American copyright law has been set on a utilitarian foundation. This model constructs copyright as a creature of positive law, by which exclusive rights (limited, in their application, by the express constraints set out in the Intellectual Property Clause) may be offered, or withheld, on whatever basis is rationally calculated to benefit the public. Congress, too, has often spoken in the same language: in, for example, this précis of utilitarian copyright from a legislative report on the Copyright Act of 1909:<sup>139</sup>

The enactment of Copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and the useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Nor primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given . . . .

In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public. The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.<sup>140</sup>

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<sup>136</sup> 347 U.S. at 219.

<sup>137</sup> 464 U.S. 417, 429 (1984).

<sup>138</sup> See also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

<sup>139</sup> 35 Stat. 1075 (1909) (repealed 1976) (hereinafter referred to as “1909 Act”).

<sup>140</sup> (H. Rep. No. 2222, 60<sup>th</sup> Cong., 2d sess.). Almost a century earlier, Thomas Jefferson expressed the same idea with characteristic felicity:

#### D. Copyright's Increasingly Uneasy Fit With the Constitution

If our copyright system were driven purely by the utilitarian tenor of the Intellectual Property Clause, rather than by more concrete political considerations,<sup>141</sup> we would expect our copyright term to be relatively short and formalities to permeate the law. But while Congress and the courts have paid lip service to utilitarian copyright, they have, on a practical level, acquiesced to developments in the law—including the move from conditional to unconditional copyright, the broadening of the rights granted by copyright to cover nearly every conceivable use of the protected work (including the production of derivative works), and the extension of the term to a point that the return to rightsholders is indistinguishable from that produced by perpetual copyright—that together have made our theoretically utilitarian system almost indistinguishable from continental European systems that are based on an author's natural rights.<sup>142</sup>

The pressing question at this point, given the Supreme Court's recent holding in *Eldred v. Ashcroft*, is, of course, "So what?". Given the *Eldred* Court's willingness to cede to Congress the task of reconciling the copyright laws to the demands of both the Intellectual Property Clause and the First Amendment, there seems to be little prospect that the judiciary will arrest copyright's drift away from its utilitarian moorings.

And yet, embedded in the majority's opinion in *Eldred* is a phrase that shows that a sudden collision between the copyright laws and the Constitution is still quite possible. The Court repelled petitioners' First Amendment claim by holding that "when ...

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If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me . . . .

Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.

Letter, Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) in THE WRITINGS OF THOMAS JEFFERSON, XIII (A. A. Lipscomb et al., eds. 1903), 335.

<sup>141</sup> See generally Posner & Landes, *supra* note \_\_\_, at ch. 15 (discussing the political economy of intellectual property law).

<sup>142</sup> See Paul Goldstein, I Copyright § 1.13.2, at pp. 1:35-1:36 (2d ed. 2000).

Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”<sup>143</sup> The Court is making a historical claim about what the “traditional contours” of copyright have been, and is asserting that because copyright has remained largely within these original metes and bounds, nothing has happened to disturb the Founders’ original conception that copyright is consistent with the First Amendment. The Court did much the same in turning away petitioners’ Intellectual Property Clause challenge: “Congress’s unbroken practice since the founding generation [of extending both new and subsisting copyrights] overwhelms petitioners’ argument that the CTEA’s extension of existing copyright fails *per se* to ‘promote the Progress of Science.’”<sup>144</sup> “[A] page of history,” the Court said, “is worth a volume of logic.”<sup>145</sup>

History may indeed surpass logic as a useful tool in legal analysis, but neither method is particularly useful if you get the basic facts wrong.<sup>146</sup> The “traditional contours” of copyright have not been altered as much as they have been obliterated—by, among other developments, our recent transition from conditional to unconditional copyright. Before 1976, copyright applied to a minority of works; it now applies to all. Before 1976, the effective copyright term for the large majority of works was 28 years; today copyright imposes a uniform term lasting, on average, three times as long. Considering the distance our law has traveled in the evolution from conditional to unconditional copyright it is difficult, at this point, to understand which of copyright’s “traditional contours” the Court believes remain.

So it is not enough to look, as the Court did in *Eldred*, at the copyright term in isolation. When one looks more closely at the effects of a series of seemingly minor changes to the copyright law (changes that are unrelated (or at least not facially related) to the copyright term), it is clear that the “traditional contours” of our copyright system went through a disjunction during the move from conditional to unconditional copyright.

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<sup>143</sup> 537 U.S. at 221.

<sup>144</sup> *Id.* at 213-14.

<sup>145</sup> 537 U.S. at 200 (citing *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

<sup>146</sup> Unfortunately, the Court’s First Amendment logic is no better than its history. The Court errs by downplaying the First Amendment concern, stating that the inquiry is less exacting where “speakers assert the right to make other people’s speeches,” rather than their own. *Id.* at 220. But characterizing the claim as “a right to make other people’s speeches” misses the core free speech issue posed by copyright extension. The Court frames the issue as focused on pure copying. Much more important is the right to engage in transformative use—i.e., to employ some elements of another’s speech for the purpose of building one’s own speech. This kind of appropriation and “re-mixing” is a common way that speech is constructed in our culture.

*Eldred* may temporarily have removed the judiciary from some elements of the copyright debate, but it has not removed the Intellectual Property Clause from the Constitution. U.S. copyright is—unlike in any other nation—tied at a constitutional level to the utilitarian premise.<sup>147</sup> That fact limits our choices in terms of what kind of copyright system we construct, and there is a powerful case to be made, even post-*Eldred*, that copyright has already drifted too far. It may be difficult at the moment to see exactly how the increasing detachment of U.S. copyright law from its constitutional underpinnings could lead to judicial intervention and invalidation of elements of the law. Here are two possible arguments that have been advanced in a lawsuit filed recently in the U.S. district court, *Kahle v. Ashcroft*:<sup>148</sup>

### 1. Term Extension Without Renewal Filter

Copyright's potential collision with the Constitution could take the form of an Intellectual Property Clause challenge to copyright extension that is somewhat narrower—but no less potentially disruptive to the status quo—than that posed in *Eldred*. The argument urges a re-evaluation of the historical record, based on an observation about the effect of the renewal formality on copyright extensions that was never raised in *Eldred*.

While Congress has extended the term of subsisting copyrights on several occasions prior to the CTEA, in every case before the CTEA, the subsisting copyrights whose terms were extended had all passed at some point through the filter of a renewal requirement. Never were terms extended except in the context of works that had been renewed to get the benefit of an extended term. Never, prior to the CTEA, were terms extended for subsisting works except for those works for which the fact of renewal established continuing commercial value—the only condition under which copyright extension could be said to benefit a rightsholder.

The Act of 1831 extended the initial term of subsisting copyrights from 14 to 28 years, but within a regime that required copyright owners to renew their copyright to secure the benefits of the maximum term of 42 years.<sup>149</sup> The Act of 1909 likewise extended the renewal term of subsisting copyrights, but the act expressly limited its effect to works that had been renewed.<sup>150</sup> Even the Copyright Act of 1976, which began the

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<sup>147</sup> Although the constitutions of several nations contain explicit authorizations for legislative creation of intellectual property rights (see, e.g., Constitution of Australia, Chap. 1, Part V, Section 51(xviii)), these provisions lack a limiting statement of purpose analogous to the “promote progress” language in the U.S. Intellectual Property Clause.

<sup>148</sup> See *supra* at note \_\_\_\_\_. The author is co-counsel for plaintiffs in this lawsuit.

<sup>149</sup> See *supra* at text accompanying notes \_\_\_\_\_.

<sup>150</sup> See *supra* at text accompanying notes \_\_\_\_\_.



march toward unconditional copyright and again extended the term of subsisting copyrights, limited its extension to works that had been renewed.<sup>151</sup>

Thus, *every extension of subsisting copyrights* prior to the CTEA conditioned the maximum copyright term upon the copyright holder satisfying a renewal requirement. In contrast, the CTEA's 20-year extension of subsisting copyrights was granted indiscriminately. But because the renewal requirement survived in American law until the Berne Convention Implementation Act removed renewal entirely in 1992, the effect of this extension differed dramatically depending upon the period during which the initial copyright was granted.

- For registered works published between January 1, 1923 and December 31, 1963, CTEA extended the term of any subsisting copyright by 20 years. But because the average renewal rate for work published between 1923 and 1926 was just 15%, 85% of the work originally copyrighted during that period had already passed into the public domain. Thus, while CTEA extended the terms of subsisting copyrights, the filter of renewal had already eliminated the vast majority of copyrights granted during this period from the burden of copyright regulation. The burdens of copyright regulation, therefore, were visited only on those works that had passed through the renewal filter—i.e., only those works for which continuing protection could be expected to provide some return for the author to offset the social costs imposed by continued exclusivity.
- For registered works published between January 1, 1964 and December 31, 1978, CTEA extended the term of subsisting copyrights by 20 years. But because the BCIA had granted an automatic renewal to all subsisting copyrights not yet in their renewal term, CTEA extended the copyright term of a class of works of which, according to historical data, approximately 85% would never have been renewed. In contrast to the situation described above, the CTEA visited the burdens of copyright protection on all works from our recent past, including the majority that would not have passed through the renewal filter. As a consequence, for a large percentage of these works, costs were imposed without the promise of any offsetting benefit.

## 2. *Formalities as a Buffer Between Copyright and the First Amendment*

In addition to the narrowed Intellectual Property Clause challenge, plaintiffs in *Kahle* press a related First Amendment attack. The *Eldred* Court rejected petitioners' First Amendment claim based on a conclusion that the CTEA "ha[d] not altered the traditional contours of copyright protection . . . ." But "the traditional contours of copyright protection" in America established a conditional copyright regime. Copyrights were

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<sup>151</sup> See *supra* at text accompanying notes \_\_\_\_.

granted, and maintained, only if rights holders took affirmative steps to secure their rights.

These “traditional contours of copyright protection” served important First Amendment interests. By requiring copyright owners to signal a desire to continue the protection of copyright, the traditional requirement of renewal limited copyright to just those works whose owners had a sufficient continuing interest in restricting use of the work. Other works were available for public use in creating new speech. Likewise, the registration and notice requirements provided clarity by identifying copyright holders and the term of protection, thus facilitating the spread of knowledge through use of public domain material and licensing of works still under copyright. Like the doctrine of “fair use,” these structural limitations on the scope of copyright’s regulation narrowly tailored the reach of the law to those contexts within which the regulation would act as an “engine of free expression.”<sup>152</sup> It likewise excluded copyright from those contexts within which the regulation would simply act as a brake on free expression.

These changes to the copyright laws, as they are applied to and affect a large volume of creative work that would never have had its copyright renewed, do not advance any legitimate government interest. They instead impose substantial burdens on speech without advancing the only legitimate interest the government might have—namely, to continue returns to rightsholders in the small minority of work that continues to have commercial value, in the hope of maximizing incentives to produce creative work.<sup>153</sup> In particular, with respect to works created after January 1, 1964, and before January 1, 1978, these changes have imposed an unconstitutional burden on speech. The term for work created between January 1, 1964 and December 31, 1977 was extended by 19 years by the Copyright Act of 1976. The term was then automatically renewed by the BCIA in 1992. Finally, the term was unconditionally extended by 20 years by the CTEA in 1998. Thus, even though historical data suggests that more than 85% of this work would never have had its copyright renewed, the law has automatically extended the term for all of

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<sup>152</sup> Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 545 (1985).

<sup>153</sup> Petitioners in *Eldred* argued that, unlike in the case of prospective term extension, extension of subsisting copyrights could not possibly contribute to increased incentive to invest in the creation of new works—because existing works cannot be created anew, it makes no sense to throw additional money at owners of subsisting copyrights. The response of the *Eldred* majority to this common-sense observation is perhaps the weakest part of its opinion: given Congress’s repeated extensions of both new and subsisting copyrights, the Court asserted, authors could reasonably expect to receive “a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time.” 537 U.S. at 214-215. But given that the pre-CTEA copyright term of life of the author plus 50 years already provided a return to the rightsholder that approached 100% of the net present value of a perpetual term, see above at text accompanying notes \_\_\_, it makes no sense to maintain that extension of subsisting copyrights provides any additional inducement to authors.

this work by 67 years. This is the first category of copyrighted works in U.S. history which has had its term extended automatically without ever passing through the filter of renewal.

Because these changes have altered the “traditional contours” of copyright, they should be evaluated under heightened First Amendment scrutiny. But even under the less exacting rational basis standard, the burdens created by these changes for certain categories of copyrighted work far outweigh any plausible benefits.

## **E. Unconditional Copyright and U.S. Accession to the Berne Convention**

The move from conditional to unconditional copyright is bad intellectual property policy. It also threatens to bring copyright into conflict with the Constitution. So what possessed us to do it? There were many factors, including gripes about the difficulties of complying with formalities that were often badly administered by the Copyright Office and the severe consequences (i.e., loss of copyright protection) arising from failure to comply.<sup>154</sup> But far the primary reason for the removal of copyright formalities was the desire, on the part of the content industries and their supporters in Congress, to accede—more than a century after its promulgation—to the Berne Convention for the Protection of Literary and Artistic Works.

### *1. The Berne Convention*

The Berne Convention, which dates from 1886, was the fruit of negotiations that had been proceeding since the first International Congress of Authors and Artists met in Brussels in 1858.<sup>155</sup> In its current form,<sup>156</sup> the Berne Convention obliges signatories to honor two basic principles: (1) a “national treatment” principle obliging all signatory nations to grant the same rights to foreign authors that they grant to their own authors;

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<sup>154</sup> See, e.g., Statement of Abraham L. Kamenstein, Register of Copyrights, before the Senate Subcommittee on Patents, Trademarks, and Copyrights, S. 1006 (89<sup>th</sup> Cong., 1<sup>st</sup> Sess.) (Aug. 18, 1965).

<sup>155</sup> See generally, Jane C. Ginsburg, International Copyright: From a Bundle of National Copyright Laws to a Supranational Code, 47 J. Copyright Soc’y USA 265 (2000).

<sup>156</sup> The Berne Convention has been revised repeatedly; particular revisions are referred to as “Acts”. The group of countries that are signatories to the Convention, referred to collectively as the “Berne Union”, has an existence separate from any particular Act. When the Convention is revised, Union members are not required to adhere to the new revision as a condition to remaining within the Union. Similarly, a country may join the Union at any time by acceding to the most recent version of the Convention. The treaty obligations of any particular Union member is measured by the terms of the particular Act or Acts to which that member has acceded. See PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT 20-21 (Oxford, 2001).

and (2) a “baseline protection” principle obliging signatory countries to adhere in their domestic law to certain minimum levels of protection as specified in the Convention.<sup>157</sup> The Convention’s baseline requirements include a copyright term for works by individual authors of life of the author plus 50 years,<sup>158</sup> and a prohibition on formalities that affect that “enjoyment and exercise” of copyright.<sup>159</sup>

In 1886, when the Convention was first promulgated, the United States had not entered into a single copyright-related international agreement. U.S. entry into the international copyright system began in 1891-92, when it concluded the first of a series of bilateral copyright agreements with France,<sup>160</sup> the United Kingdom,<sup>161</sup> and Germany.<sup>162</sup> In 1955, the U.S. acceded to the Universal Copyright Convention, an instrument that established multilateral copyright relations between signatories to the Berne Convention and other nations, including the United States, that considered the Berne Convention’s minimum standards incompatible with domestic law. As a measure to accommodate the United States, the UCC allowed member states to impose formalities as a condition of protection.<sup>163</sup>

The United States did not accede to the Berne Convention until 1989, and the Convention’s prohibition of formalities is perhaps the primary reason that the United States, alone among industrialized nations, remained outside the Convention for its first century. Nonetheless, many U.S. authors secured the Convention’s benefits prior to U.S. accession by simultaneously publishing their work in Canada, a Berne signatory.<sup>164</sup> And as Graeme Austin has noted, “[a]doption of this practice by American authors wealthy or sophisticated enough to do so ensured that many of the benefits of the Convention

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<sup>157</sup> Berne Convention, 1971 Paris Text, Art. 5(1). Under the Berne Convention’s “points of attachment” rules, a work is entitled to Berne Convention protection in signatory nations if its author is a national or domiciliary of a signatory state (see Berne Convention, 1971 Paris Text, Art. 3(I)(a), (2)), or if the work is first or simultaneously published in a signatory state (see Berne Convention, 1971 Paris Text, Art. 3(I)(b)).

<sup>158</sup> Berne Convention, 1971 Paris Text, Art. 7(1).

<sup>159</sup> *Id.* at Art. 5(2).

<sup>160</sup> Bilateral Agreement of July 1, 1891, 27 Stat. 981 (Proclamation No. 3).

<sup>161</sup> *Id.*

<sup>162</sup> Bilateral Agreement of April 15, 1892, 27 Stat. 1021 (Proclamation No. 24).

<sup>163</sup> Universal Copyright Convention, 1952 Geneva Text., Art. I.

<sup>164</sup> Austin, *supra* note \_\_\_, at 42.

accrued to American copyright industries. American society, however, shouldered few of its burdens.”<sup>165</sup>

## 2. *Berne’s Rule Against Formalities*

Curiously, the Berne Convention allowed formalities at its inception, providing that enjoyment of the rights prescribed by the Convention were subject “to the accomplishment of conditions and formalities prescribed by law in the country of origin of the work.”<sup>166</sup> By 1908, however, the Convention had been amended to provide that member countries must not condition the acquisition, exercise, or enjoyment of copyright protection for the works of foreign authors on the observance of any formality.<sup>167</sup>

The current version of the Convention’s prohibition against formalities is set out in Article 5(2) of the 1971 Paris Act, which provides that

The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and exercise shall be independent of the existence of protection in the country of the origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.<sup>168</sup>

The term “formality” is not defined, but is understood in the sense of an administrative obligation set out in a national law that imposes a condition necessary for a copyright to exist, or for the right to continue or to be practically available.<sup>169</sup> Those provisions of U.S. law that provide for voluntary formalities—i.e., voluntary notice, registration, recordation of transfers—and that provide incentives for compliance,<sup>170</sup> either apply only to U.S. works (for example, in the case of the bar on bringing infringement litigation absent registration, which was believed to negate the right to

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<sup>165</sup> Id. This “back door” to Berne has, since 1914, been subject to the power of Union members to retaliate against authors who are nationals of non-Union countries but obtain Berne protection through first publication in a Union country, if the author’s country of nationality “fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union.” Berne Convention, 1971 Paris Text, Art. 6(1).

<sup>166</sup> Berne Convention, 1886 Art. II(2).

<sup>167</sup> Berne Convention, 1908 Berlin Text, Art. 4(2).

<sup>168</sup> Berne Convention Art. 5(2).

<sup>169</sup> W.I.P.O. Guide to the Berne Convention for the Protection of Literary Works (Paris Act 1971) at 33.

<sup>170</sup> See *supra* at text accompanying notes \_\_\_\_.

“exercise” the copyright and thus to qualify as a prohibited formality under Berne)<sup>171</sup> or are not the type of formality that Berne prohibits.<sup>172</sup>

Importantly, although the terms of Article 5(2) bar the imposition of formalities on foreign authors, signatory nations remain free to impose formalities on the works of their own nationals. As the World Intellectual Property Organization’s official exegesis of the Convention explains, the freedom from formalities provided by the Convention “exists independently of any protection that the work enjoys in its country of origin. In fact, such country remains absolutely free to subordinate the existence or exercise of the rights on that work in that country to such conditions or formalities as it thinks fit: it is purely a matter of domestic law.”<sup>173</sup> U.S. accession to Berne, therefore, did not require the wholesale removal of mandatory registration, notice and recordation of transfers. Rather, the application of these mandatory formalities could simply have been limited to the works of U.S. authors, which, as we have seen, comprise a large majority of works published in the U.S.<sup>174</sup> Voluntary registration and notice formalities, and the current system of inducements to compliance, could have been established for the works of foreign authors.

In contrast, Berne accession did, for all practical purposes, require the removal of mandatory renewal for both U.S. and foreign works. Article 7(1) of Berne prescribes a

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<sup>171</sup> See STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 106 (1983) (“[T]he necessity to register before bringing an action would probably be regarded as a ‘formality’ as it negates the ‘exercise’ of the right without such registration.”); Mayer Gabay, The United States Copyright System and the Berne Convention, 26 Bull. Copyright Soc’y 202, 208 (1979) (“It is true that registration is ‘permissive’ and does not, under the 1976 Act, constitute a condition precedent for *acquisition* of copyright. But these factors merely give rise to a *bare right* that is incapable of being *exercised* in a U.S. court of law until registration is effected.”).

<sup>172</sup> The fact that registration affords successful infringement plaintiffs the opportunity to collect statutory damages and attorneys fees, for example, is not believed to violate the Berne Convention because that instrument does not itself require that a country provide for such recoveries. See Gabay, *supra* note \_\_\_, at 209-10; Melville Nimmer, Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law, 19 Stan. L. Rev. 499, 514 (1967).

<sup>173</sup> GUIDE TO THE BERNE CONVENTION, World Intellectual Property Organization, § 5.6. WIPO, one of the 16 specialized agencies of the United Nations system of organizations, is the principle forum for negotiation of international intellectual property agreements. Headquartered in Geneva, Switzerland, WIPO administers 23 international treaties dealing with different aspects of intellectual property protection. The Organization counts 179 nations as member states. For more information on WIPO’s mission, see <<http://www.wipo.int/about-wipo/en/dgo/pub487.htm>>.

<sup>174</sup> See *supra* at text accompanying notes \_\_\_\_.

minimum term of protection for the works of individual authors of life of the author plus 50 years. So even a longer term was contemplated, its continuation could not be conditioned on renewal until expiration of the very long minimum term. Similarly for anonymous or pseudonymous works, Article 7(3) of Berne prescribes a minimum term of 50 years; continuation of the term could be conditioned on renewal only after that. And, importantly, mandatory renewal, even if imposed at a point that does not conflict with Berne's minimum terms, could be applied only to the works of U.S. authors: Berne's prohibition of mandatory formalities would permit the imposition of only a voluntary re-registration procedure for the works of foreign authors. (Because the copyright term would remain unitary and there is no possibility of loss of rights for failure to renew, it doesn't make sense to speak of voluntary "renewal"; indeed, the only purpose of re-registration would be to create a fresh record of ownership, rather than to move commercially exhausted works into the public domain.)

Given these limitations, maintaining any renewal provision, whether mandatory or voluntary, is not worth the trouble. Under the Berne minima, assuming an average life span of 35 years after creation of a work, more than 85 years will have passed before most copyrights could be subject to mandatory or voluntary renewal. By that point—as the discussion above at pp. \_\_\_\_ shows—more than 99% of works will long have been commercially exhausted, and so there is no inducement that could cause any substantial number of rightsholders to invest in compliance with renewal or re-registration. Although the minimum period is somewhat shorter—50 years—for anonymous and pseudonymous works, the data on the rate of copyright depreciation, discussed above at pp. \_\_\_\_, suggest that more than 90% of works will have lost all value in this period, thus making any renewal or re-registration formality largely, if not wholly, meaningless.

### 3. *Berne's "Practical Hostility" to Formalities*

Why does the Berne Convention prohibit formalities? The response most often has been made at the level of copyright theory; i.e., that formalities are out of step with natural rights theory of copyright, which has been characterized as the "Grundnorm" of the Berne Convention.<sup>175</sup>

That explanation is deeply unsatisfying, for the degree to which formalities are inconsistent with natural rights-based copyright is easily overstated. Even the nations of continental Europe, whose copyright systems are most closely identified with a natural rights framework, do not provide for perpetual copyright,<sup>176</sup> and have never done so.

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<sup>175</sup> Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 *Houston L. Rev.* 763, 771 (2003). See also SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, at 93 (1987) ("Authors' rights . . . remain at the centre of the international framework.").

<sup>176</sup> The European Union has, by a 1996 EU Directive, required member nations to adopt a uniform life-plus-70 term. The EU term has become the global benchmark, has been

Consequently, even in so-called “natural rights” systems, copyrights expire, works enter the public domain, and the law therefore must seek some form of “utilitarian” balance between private incentives and public access. Indeed, even in a notional system that imposes a perpetual copyright, requiring registration and notice would nonetheless be a sensible step. As has been detailed above, a reliable and easily accessed ownership registry encourages transfers and licensing by lowering the cost to the would-be transferee or licensee of identifying rightsholders. A system focused on returns to authors should therefore seek to maximize authors’ rewards with modest investments in administrative mechanisms, such as a registry, that reduce transaction costs.

Again, there is no sharp disjunction between “natural rights” and “utilitarian” copyright systems in the manner one would expect if copyright was driven by theory rather than exigency. The primary difference between the utilitarian and natural rights approaches is which side of the balance is emphasized. So formalities could play an important role in any system of limited-term copyrights in maximizing copyright’s social utility by focusing protection.

So how are we to explain Berne’s aversion to formalities? The simplest and best explanation is much more prosaic than the one commonly offered. The overarching purpose of the Berne Convention is to provide protection to authors whose works will be published in many countries. Perhaps the most practically important element of that protection—more important for the protection of authors’ interests than establishing a minimum copyright term—is to avoid the necessity that authors comply with mandatory formalities in every country in which their works are published or may be found. Berne’s proscription of mandatory formalities is a rational response to the difficulty of complying (and maintaining compliance) with differently-administered formalities that may have been, absent the Convention, imposed in dozens of national systems, some with registries, some without, and none of which share information.

This observation is helpful in better understanding the Berne Convention, but, more usefully for our purposes here, it also has important implications for the status of formalities in U.S. copyright law. In deciding whether a particular formality interferes with the “enjoyment and . . . exercise” of copyright, and thereby runs afoul of Article 5(2) of the Convention, it is important that Berne’s anti-formality principle does not arise from any supposed foundational incompatibility between formalities and an authors’ rights copyright framework, but flows instead from the practical desire to relieve authors from the likelihood that the difficulty of complying with mandatory formalities in many jurisdictions will swamp the potential gains from international distribution, or, in the worst case, lead to the forfeiture of valuable rights.

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cited as a factor in the CTEA’s installment of an identical term in U.S. law, *Eldred*, 537 U.S. at 195-96, and is now reflected in domestic legislation in Switzerland, Brazil, Costa Rica, Ecuador, Israel, Hungary, Paraguay, Peru, Romania, Slovenia, and Turkey.



We will turn now to consider how formalities may be reintroduced into the U.S. system, in light both of the problems that Berne was trying to solve, and technological developments that now allow much less burdensome approaches to solving the same problems.

### **III. REFORMALIZING COPYRIGHT**

#### **A. Defining “Interoperable” Formalities in the Berne Convention**

Berne’s prohibition of formalities dates from 1908, a time in which requiring authors to comply with formalities in the many countries in which a work may be published—i.e., requiring an author (or publisher) to inform himself about the requirements of the law in countries with which he has no familiarity, and then to obtain and fill out forms in a variety of languages—would be difficult, expensive, and often result in unintentional noncompliance and the loss of valuable rights. Article 5(2) of the current Paris Text of the Berne Convention was promulgated in 1971, but the nature of the problem had not changed in the intervening 63 years: copyright systems remained substantively and procedurally diverse, the mechanisms of compliance in many countries remained balky, and the costs of informing oneself about requirements in different countries, and then in complying with them, high.

Between 1971 and now, however, there has been a series of related technological changes that could make compliance with a re-designed set of formalities quick and easy. That change is, of course, the rise of computers and the Internet. Now it is possible for an author publishing a work internationally to comply with formalities in his or her home country, or in the country of a work’s first publication, and to have the data generated by that compliance formatted and transmitted costlessly to permit compliance with formalities in other jurisdictions. But changes to technology alone are not enough—changes to the law are also required. To make compliance cheap, the law must ensure that data generated in one jurisdiction will be sufficient to permit compliance in any jurisdiction that chooses to re-introduce formalities into its domestic copyright laws.

The simplest way to take advantage of what technology now allows would be to propose a new Berne text that removes the prohibition in Article 5(2) of the current Paris Text<sup>177</sup> and replaces it with a provision allowing member countries to impose formalities,

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<sup>177</sup> The North American Free Trade Agreement also contains provisions related to intellectual property, see Goldstein, *supra* note \_\_\_, at p. 48. In particular, NAFTA Article 1703(2) mirrors Berne Article 5(2)’s proscription of formalities, and must likewise be modified to permit re-formalization of domestic law in the United States, Canada and Mexico. NAFTA Article 1703(2) provides that “[n]o Party may, as a condition of according national treatment under this Article, require rights holders to comply with any formalities or conditions in order to acquire rights in respect of copyright and related rights.” Since NAFTA signatories Canada, Mexico, and the United

provided that they adhere to a set of standards that make formalities “interoperable” across jurisdictions. What would the changes to the Berne Convention look like?

### 1. *The Reciprocity Principle*

The most direct approach would install a “reciprocity principle” alongside the existing national treatment and minimum standards principles that now drive Berne. The reciprocity principle would require that all Berne jurisdictions that impose formalities permit foreign authors to comply with formalities in their national laws by complying with formalities either in their home country or in the work’s country of first publication or registration. The reciprocity principle would not require any particular Berne nation to impose formalities—i.e., it would not modify Berne’s current minimum standards requirements. It would, rather, require only that Berne nations that choose to re-formalize their domestic copyright laws do so according to standards set out in Berne.

Some nations may, of course, choose not to re-introduce formalities into their domestic law. But if some Berne Union countries have formalities, and others do not, the possibility arises that the home country of an author, or the nation of first publication of his work, does not have a registration requirement to which other Berne countries with formalities can grant reciprocity. To accommodate authors in this category who wish to comply with formalities across Berne jurisdictions, the Berne nations should also establish a centralized WIPO registry, subject to the same standards agreed among Berne members, and subject also to the condition that all Berne nations will grant reciprocity.

To make the reciprocity principle practically workable, Berne signatories would enter into a side agreement that would standardize across jurisdictions the data required to register a copyright, and standardize formatting of that data so that registration information—author(s) name(s) and address(es), creation and registration dates, etc.—may readily be shared among jurisdictions. The Berne signatories could then establish an information-sharing agreement whereby registration data obtained in one country could be made available to other jurisdictions, at the rightsholder’s discretion. As the secretariat for the Berne Union, WIPO would be well-placed to coordinate the actual transfer of data among Berne members.

Taking this approach, it is not necessary to amend Berne to prescribe a minimum set of formalities. It would suffice, rather, simply to remove Article 5(2)’s prohibition, to install the reciprocity principle, to work out a set of standards to ensure interoperability, and then to leave to the member states the decision whether to re-install formalities or not.

### 2. *The Reciprocity Principle and Neighboring Rights Agreements*

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States are all parties to a text of the Berne Convention that prohibits formalities, NAFTA Article 1703(2) is largely duplicative of Berne on the issue of formalities.

For countries that, unlike the United States, do not include protection for performances, sound recordings (also referred to as “phonograms”) and broadcasts in their copyright laws, but locate them instead in separate “neighboring rights” statutes, reformation of domestic law must include changes to the law governing both types of right. Similarly, the same reciprocity principle that would be installed into the Berne Convention must also be introduced into the applicable international agreements governing neighboring rights—an issue of some complexity.

The principal international agreement defining protection of neighboring rights is the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, also known as the Rome Convention. This instrument extends Berne-style national treatment and minimum rights principles to neighboring rights, although the minimum terms established are shorter.<sup>178</sup> Unlike Berne Article 5(2), Article 11 of the Rome Convention does not prohibit signatories from conditioning protection of neighboring rights on formalities. Article 11 provides, however, that any signatory that conditions protection for performers on or producers of phonograms on compliance with formalities must permit its requirements to be met by affixing a prescribed notice to the recording or its container. Adoption of the reciprocity principle, therefore, would require removal of the rule allowing blanket compliance through notice with formalities pertaining to protection of phonograms.

The 1973 Convention for the Protection of Producers of Phonograms Against Unauthorized Distribution of Their Phonograms, referred to as the Geneva Phonograms Convention, which is aimed at cross-border record piracy, requires signatories to protect qualifying phonogram producers “against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.”<sup>179</sup> Like the Rome Convention, the Geneva Phonograms Convention allows signatories to impose formalities as a condition of protection for phonograms, but provides that affixation of notice must suffice to comply with all mandatory formalities.<sup>180</sup> Thus, the same changes that would be required to the Rome Convention must also be applied to the Geneva Phonograms Convention.

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<sup>178</sup> Rome Article 14 establishes minimum 20-year terms for both phonograms and performances (measured either from the date of performance (for unfixed performances) or from the data of fixation for performance recorded on phonograms). Article 17 of the WIPO Performances and Phonograms Treaty and Article 10(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) extend these minimum terms to 50 years. TRIPs Article 14(5) also imposes a minimum 20-year term for broadcasts.

<sup>179</sup> Geneva Phonograms Convention, Art. 2.

<sup>180</sup> *Id.*, Art. 5.

Now that we have seen what changes to international law are necessary to shift the treatment of formalities from hostility (Berne), or at best, grudging acceptance (Rome and Geneva), to acceptance with reciprocity, let us briefly examine how such a system would work with respect to each of the familiar types of formality.

### 3. *The Reciprocity Principle in Practice*

*Registration.* The application of the reciprocity principle to the registration formality is comparatively straightforward. Once a work is registered in one jurisdiction (or with the centralized WIPO registry), it would be registered in all Berne Union jurisdictions that have re-installed a registration formality in their domestic law.

*Recordation of Transfers.* The same scheme established for registration should also apply to recordation of transfers—a transfer that is successfully recorded in one jurisdiction (or with the Berne registry) should suffice to record that transfer in all jurisdictions in which the work previously has been registered.

*Notice.* Berne Union nations would be free, under the reciprocity principle, to require that notice be given for some or all works. Of course, if a Berne nation creates an effective, easily accessible copyright registry, there is little to be gained by also requiring notice—the registry should provide enough information to make tracing of copyright ownership simple and cheap.<sup>181</sup> In the instance, however, that some Berne signatories may choose to include a notice requirement in their re-formalized domestic law, the signatories should agree to standardize the form of notice for different types of works to ensure (1) that no more information is required to be elicited to comply with notice requirements than was supplied to complete registration, and (2) that the same form of notice that suffices in one jurisdiction for any particular type of work will also be accepted throughout the Berne Union. These rules would prevent differing standards for notice that might cause unintentional loss of rights. They would also encourage publication with the standardized form of notice even in those jurisdictions that do not require it as a condition of protection.

*Renewal.* Creating a renewal formality that is interoperable across jurisdictions raises a number of somewhat more complex problems, but should be achievable with some increased level of coordination among Berne members.

The first problem is whether, to permit Berne nations to re-install the renewal formality, a revised Berne Convention would have to remove the provision in the current version of Berne requiring all signatories to grant a minimum copyright term of life of the

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<sup>181</sup> Indeed, because notice on existing works usually cannot be updated, notice can give misleading information regarding current ownership.

author plus fifty years.<sup>182</sup> While the question is not free from doubt, a strong argument can be made that the minimum term is not inconsistent with a renewal formality imposed at some time before the expiry of life-plus-fifty. Berne's prohibition of formalities is contained in an Article separate from its minimum term requirements. Remove the prohibition of formalities, and there is no other provision in the Convention suggesting that full enjoyment of the life-plus-fifty term could not be conditioned on compliance with a renewal formality at some point during the term. It is clear that absent Berne's current prohibition of formalities, Berne members could re-impose a registration formality—i.e., could condition the enjoyment of *any portion* of the minimum term upon registration. Similarly, Berne member states that re-introduce a renewal formality should be able to condition enjoyment of *some portion* of the “minimum” term on compliance with the formality. In both instances, the law would continue to offer a Berne-compliant minimum term. Remove the current ban on formalities, and nothing in the Convention specifies that the term, if offered equally to every author, must be enjoyed in full by every author without condition.

The second problem is a more practical one: how to coordinate renewal across jurisdictions, when different Berne member states may impose renewal requirements at different points in the copyright term. A simple application of the reciprocity principle threatens to create substantial confusion. If a rightsholder who complies with the renewal formality in the jurisdiction in which a work was first registered is deemed to have complied with renewal in any jurisdiction in which a renewal is required, then absent detailed knowledge of the point at which renewal may be required in a potentially large number of Berne jurisdictions, a would-be user will find it difficult to determine whether a work has been timely renewed.

For example, suppose that a work is first registered in country A, which imposes a renewal requirement at 30 years into the term. Twenty-five years into the work's term, a would-be user in country B inquires whether the work is in the public domain. Country B imposes a renewal formality at 15 years. The user sees that the work was registered 25 years ago; under country B's law, the work would have passed into the public domain when the rightsholder failed to timely renew. But under country A's laws, the work is still in its initial term; renewal will not be required for another five years. Accordingly, under a simple application of the reciprocity principle, unless the user understands (1) where the work was first registered, (2) when the renewal requirement occurs in that jurisdiction, and (3) that country A's renewal requirement is the relevant one, the user will not easily be able to determine whether the work is in the public domain or not.

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<sup>182</sup> See Berne, Art. 7(1). See also Berne, Art. 7(2) (establishing for cinematographic works a minimum term of fifty years after publication (or, for unreleased films, fifty years after production)); Berne, Art. 7(3) (establishing for anonymous and pseudonymous works a minimum term of fifty years after publication); Berne, Art. 7(4) (establishing for photographs and works of applied art a minimum term of twenty-five years following a work's production in those countries that protect these types of works).

These information problems can be mitigated, of course, even if they cannot be eliminated. The standardized registration and notice format should include information on the nation of the work's first registration, and that information should be made available in all on-line registry sites maintained in the various Berne nations. In addition, Berne signatories should be encouraged to disseminate information about the rules governing renewal, and how to determine which renewal term applies to a particular work. Taken together, these measures might mean that the benefit, in terms of the simplicity of a straightforward application of the reciprocity principle to renewal, outweighs the cost in terms of the increased complexity of determining the status of rights.

An alternative, which would require a greater degree of coordination among Berne nations, would be to standardize renewal terms for all jurisdictions that re-install a renewal formality into their domestic law. The reciprocity principle would then apply to grant automatic compliance with all Berne nations' renewal requirements based on timely compliance with the requirement in the country of first registration, or by renewing with WIPO, if original registration was made with the WIPO registry. Based on the depreciation calculations made by Landes and Posner, the Berne nations could impose more than one renewal obligation during the term. A first renewal obligation set at 10 years would move approximately 50% of registered works into the public domain. A second renewal requirement set in the vicinity of 43 years would result in only 10% of the number of originally registered works remaining under copyright. A third renewal requirement set at 65 years would move all but 1% of the number of originally registered works into the public domain. The works left under copyright after 65 years would be those of truly enduring commercial value, for which the full term of copyright would be likely to provide significant continuing benefits.

## **B. Defining “New-Style” Berne-Compliant Formalities**

If changing Berne to explicitly permit formalities is not possible, is there still a way to re-formalize U.S. domestic law? There are several alternatives, of varying merit. This section will first briefly discuss two long-shot possibilities—the reintroduction of formalities for U.S. (but not for foreign) authors, and U.S. retrocession from Berne. I then focus on an alternative that seems much more sensible—the re-introduction into U.S. law of “new-style” formalities that provide the benefits of traditional formalities, but that do not run afoul of Berne's proscription of conditions that interfere with the “exercise and enjoyment” of copyright.

### *1. Reintroducing Old-Style Formalities for U.S. Authors*

Because Berne does not prevent signatories from imposing formalities on the works of domestic authors or authors from non-Berne signatory nations, the U.S. could have retained a full set of traditional formalities for those works (which constitute, as has been

seen, the large majority of works published in the U.S.).<sup>183</sup> In fact, an advisory group established by the Department of State to assess what changes to U.S. law would be necessary for Berne accession advocated this position, as part of a more broadly minimalist approach to implementation of Berne which sought to alter only those portions of U.S. law that the group deemed clearly irreconcilable with the Convention.<sup>184</sup>

The minimalist approach of restricting unconditional copyright to foreign authors is, for reasons that are not difficult to imagine (i.e., the antipathy to granting foreign authors more rights than U.S. authors), not the approach that we took. Whether the politics of copyright are likely ever to shift in a way that would make the minimalist approach to unconditional copyright viable is a question beyond the scope of this Article. It is worth noting, however, that restricting unconditional copyright to foreign works would represent a significant improvement on the status quo without any risk of non-compliance with Berne.

## 2. *Berne Retrocession, and Reliance on Universal Copyright Convention*

Because the U.S. is a signatory to the Universal Copyright Convention,<sup>185</sup> and because before it acceded to Berne it negotiated bilateral copyright agreements with several nations that were not UCC signatories,<sup>186</sup> it would be possible for the U.S. to end its compliance with Berne, and rely instead on the UCC, which, unlike Berne, allows the imposition of formalities for the works of both domestic and foreign authors.

One potential cost to retrocession arises from Berne Article 6(1), which permits Berne nations to restrict the protection accorded to works of authors who are nationals of a non-Berne country that “fails to protect in an adequate manner the works of [Berne nationals].”<sup>187</sup> There is little commentary on this provision, so it is difficult to forecast whether subjecting foreign works to formalities (at least formalities that do not discriminate between domestic and foreign works, and for which compliance is easy and cheap) would rise to the level of a “fail[ure] to protect in an adequate manner” the rights

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<sup>183</sup> See supra at text accompanying notes \_\_\_\_.

<sup>184</sup> See Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 Colum-VLA J. of Law & the Arts 513, 622 (1986) (“[W]e have proposed what we think are *minimal* amendments to the law, only where change is *clearly* required, based upon widely shared understandings of Berne obligations . . . . A number of the alternatives we propose for consideration seek to exploit the distinction in treatment between works of foreign and national origin permitted by the Berne Convention.”).

<sup>185</sup> See supra at text accompanying notes \_\_\_\_.

<sup>186</sup> See supra at text accompanying notes \_\_\_\_.

<sup>187</sup> Berne, Art. 6(1).

of foreign authors. Even if re-formalization of U.S. copyright would lead to a determination that the U.S. had fallen below an “adequate” level of protection, retaliation under Article 6(1) likely must be proportional to Berne authors.

This “nuclear option” is, of course, very unlikely ever to be tried. That said, it is available as a bargaining chip in aid of an effort to enact a revision of Berne that adopts the reciprocity principle.

### 3. *Indefinitely Renewable Copyright*

William Landes and Richard Posner have proposed a system of indefinitely renewable copyrights—i.e., a perpetual copyright term, conditioned on periodic renewal.<sup>188</sup> Landes and Posner suggest that such a system would result in more works entering the public domain more quickly; their conclusions in this regard are very likely correct. The Landes and Posner proposal is subject, however, to two critiques; the first is significant, the second, for my purposes, determinative.

First, a system of indefinitely renewable copyrights would prevent any work of enduring commercial value (many of which would also have important cultural value) from ever entering the public domain. For reasons that have been made clear above, extending copyright indefinitely for valuable works would raise the cost of transformative use of these works, and would give rightsholders a perpetual veto power over uses they don’t like. And these cultural and First Amendment costs are not balanced by countervailing benefits. Because the current regime of limited but very long copyright terms gives rightsholders virtually the same return (from a net present value perspective) as would be produced under a perpetual term, a shift to perpetual copyright for valuable works would yield no significant enhancement to the incentive to create.

Landes and Posner also discuss a series of limited term options conditioned on repeated renewal requirements. These avoid the first objection, but they do not avoid the second: because they employ an old-style renewal formality (i.e., one that results in termination of rights for failure to comply), and because none of the proposals would guarantee a minimum term of life-plus-fifty, all versions of the Landes and Posner approach would require the U.S. to withdraw from the Berne Convention.<sup>189</sup> The authors make note of the incompatibility of their proposal with Berne,<sup>190</sup> but their concerns,

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<sup>188</sup> William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. Chi. L. Rev. 471 (2003); Landes & Posner, *supra* note \_\_\_, at ch. 8.

<sup>189</sup> Incompatibility with Berne’s rule against formalities could be avoided, of course, by limiting the proposal to works of U.S. authors. But even such a limitation would not prevent incompatibility with the life-plus-fifty minimum term requirement, which applies to all works.

<sup>190</sup> Landes & Posner, *supra* note \_\_\_, at 215 n.15.



unlike mine, are focused solely on the economic effects of their proposal, and not on the consequences of their proposal for U.S. participation in the international copyright system.

#### 4. *The Public Domain Enhancement Act*

Another possible approach is set out in a bill currently before Congress, the Public Domain Enhancement Act.<sup>191</sup> Sponsored by Rep. Zoe Lofgren (D-CA), the PDEA would give copyright owners unfettered rights for 50 years after the author's death—thereby complying with the Berne Convention's minimum term requirement. At that point, the owners of the works of U.S. authors would be required to file a notice of continuation and pay a \$1 fee in order to continue the copyright for an additional 20 years. Because only a small number of works would retain any commercial value at the expiry of the minimum term, most copyright owners would not bother to file a notice of continuation and pay the fee. On September 4, 2003, the PDEA was referred to the House Subcommittee on Courts, the Internet, and Intellectual Property. There it has languished.

Unlike the Posner and Landes proposal, the PDEA is not incompatible with Berne. The PDEA's renewal requirement comes only after the completion of the minimum life-plus-fifty term. And the requirement is limited to the works of U.S. authors, thereby avoiding conflict with Berne's rule against formalities.

Nonetheless, the PDEA is vulnerable to the critique that its effect is limited to tinkering around the margins. A large percentage of works are commercially valueless at inception or have an initial value that is quickly depleted—all of these works, however, will continue under the PDEA to be subject to a very long (life-plus-fifty) copyright term. While life-plus-fifty is marginally better than life-plus-seventy, it may reasonably be asked whether the game is worth the candle.

#### 5. *New-Style Formalities*

A fifth option, and by far the most attractive, is to formulate and install in U.S. law a set of new-style formalities that provide the filtering and information-creation benefits of traditional formalities but, because they do not affect copyright's "enjoyment and exercise", comply with our Berne obligations under the current Paris Text. This approach is attractive because it would require changes only to U.S. law: Berne and the other international agreements that govern copyright would remain undisturbed. Integrating new-style formalities with the current text of the Berne Convention does, however, raise several significant questions.

What, exactly, is a condition that interferes with the "enjoyment and exercise" of copyright? A solid starting point is that the "exercise and enjoyment" language at least means that failure to comply with a formality cannot formally terminate the right, or

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<sup>191</sup> H.R. 2601 (introduced 6/25/2003).

prevent it from arising in the first place. It is unclear how much further “enjoyment and exercise” goes than that; I will return to this problem later.

Assuming for the moment that Article 5(2) allows a range of options short of formal nullification of the copyright, we are still faced with a difficult problem—new-style formalities have to create a sufficient incentive for compliance to construct a reliable record of ownership, and to reliably signal copyright status, but cannot use the forfeiture of rights to incent compliance.

a. *Voluntary Formalities Plus Compulsory Licenses*

The simplest solution would be to preserve formally voluntary registration, notice, and recordation (and re-establish a formally voluntary renewal formality) for all works (including works of foreign authors), but then incent compliance by exposing the works of non-compliant rightsholders to a compulsory license. The royalty payable under the compulsory license would be low: ideally, the royalty to license a work that a rightsholder has failed to register, notice, re-register in the case of a transfer (i.e., record), or renew should be set to approximate the cost of complying with these formalities (i.e., the total cost of informing oneself about the details of compliance, and then satisfying them). That way, a rightsholder who expects his work to produce revenue exceeding the cost of complying with the relevant formality will prefer to comply with the formality, whereas a rightsholder who expects his work to produce revenue amounting to less than the cost of compliance will prefer to expose his work to the compulsory license. (The rare rightsholder who estimates the likely revenues from his work to be equal to the cost of complying with the formality will be perfectly indifferent between compliance and exposure to the compulsory license.)

This system of formally voluntary formalities plus compulsory licenses—which I have referred to previously, and will hereinafter, as “new-style” formalities—establishes indirectly what the traditional system of compulsory formalities did directly: it filters out of copyright commercially valueless works for which protection (or the continuation of protection) serves no purpose, and restricts copyright to those works for which protection is needed to ensure that the rightsholder is able to appropriate the commercial value of the expression. For the filtering function to work, of course, the government would have to maintain an easily accessible and up-to-date public registry. Given current computer database and search technology, this will not be difficult.

Importantly, the use of compulsory licenses in a system of new-style formalities avoids the general objection to the forced licensing of intellectual property goods—the need for a legislature, agency or court to set a price for the license in the absence of market negotiations. With respect to the particular use of compulsory licenses proposed here, compliance with the formalities—or, rather, the failure to comply—serves as a price signal. Failure to comply means that the rightsholder places a minimal value on the right, a value no greater than the cost of compliance. That is all we need to know about works for which rightsholders fail to comply with formalities. And by exposing them to the

compulsory license, we are giving these rightsholders nothing less than what they themselves expect in term of returns. Exposing the property to a nominally priced compulsory license is therefore efficient: the system removes transaction costs that would otherwise frequently prevent use, while charging an approximately optimal price (i.e., near zero) for a license. With respect to the other works, the works for which rightsholders comply with formalities, the market continues to set the price of a license.

Compulsory licenses can be analogized to the “penalty defaults” of the type proposed by Ian Ayres and Robert Gertner as gap-filling rules for incomplete contracts.<sup>192</sup> Default rules in contract theory are rules that are intended to fill gaps in contracts by providing the parties with what they likely would have contracted for. “Penalty defaults” are gap-filling rules that are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer. Penalty defaults are purposefully designed to impose what the parties would not want, in order to encourage the parties to negotiate the solution that they do want. Importantly, penalty defaults incent contracting parties to reveal information to one another that might not be revealed otherwise.

Although Ayres and Gertner formulate and apply their theory of penalty defaults in the contract law context, the theory can be applied in the intellectual property context as well. The compulsory licenses that back new-style formalities are a kind of penalty default rule, in that they are precisely the outcome that the owner of a valuable copyright would not wish. The existence of the compulsory license encourages owners of certain works to produce information that might not be produced otherwise—i.e., that their works are sufficiently valuable that continued copyright protection makes sense.

#### b. *New-Style Formalities and Berne*

This system of voluntary formalities backed with compulsory licenses raises an immediate question: do they comply with the Berne Convention?

The first issue is whether new-style formalities offend Berne Article 5(2)’s proscription of formalities that interfere with the “enjoyment and exercise” of copyright. There are two senses in which that phrase may be interpreted. The first relates to the rightsholder’s ability to enjoy whatever economic rents his work may produce. For the reasons set out above, the compulsory licenses that attend new-style formalities do not interfere with rightsholders’ economic expectations, at least not categorically. Some authors will doubtless underestimate the future revenues that their works may bring in, and will mistakenly opt not to comply with formalities and expose their work to a compulsory license. Of course, the possibility of mistake works both ways: some authors will mistakenly opt to invest in compliance with formalities for works that are unlikely to

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<sup>192</sup> Ian Ayres and Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L. J. 87 (1989).

produce revenues greater than the cost of compliance. But despite the certainty that some authors will make the wrong decision, it is nonetheless true that authors (and assigns such as publishers) are the parties best placed to decide whether the likely returns from a particular work are great enough to merit investment in compliance with formalities.<sup>193</sup> And in any event, if an author is uncertain regarding his work's future value, he retains the option of making the relatively small investment required to comply with formalities as a form of insurance against incorrectly valuing his asset.

There is a second sense to the "enjoyment and exercise" of copyright, one that is related to, but nonetheless distinct from, the rightsholder's economic expectations. Under Article 9 of the Berne Convention, the author of a literary and/or artistic work has the exclusive right of authorizing the reproduction of his work "in any manner or form." This includes traditional photocopying, digital copying or any other form of copying, of the entire work or any part thereof. These exclusive rights include, as a necessary corollary, the right *to refuse* to authorize reproduction of a protected work. This right to prohibit reproduction is tied in part to the author's economic right: by restricting reproduction, the author may reduce output of his work and thereby realize supracompetitive returns if his work lacks ready substitutes.

But the "enjoyment and exercise" of copyright is tied, as well, to the moral rights that Berne requires signatories to grant to authors. Article 6*bis* of the Berne Convention requires member states to grant authors rights of paternity (i.e., the "right to claim authorship") and integrity (i.e., the "right to object to any distortion, mutilation or other modification" that would prejudice the author's reputation).<sup>194</sup> These rights are independent of the author's economic rights, survive the transfer of those economic rights,<sup>195</sup> and must, in most instances, persist for at least the expiry of the economic rights, even following the death of the author.<sup>196</sup>

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<sup>193</sup> The copyright law of Japan allows compulsory licensing in an instance that is mildly probative of whether new-style formalities would comply with Berne. Under Article 67 of the Japanese law, compulsory licenses can be applied for where the copyright owner of a particular work cannot be identified or located. The Commissioner of the Agency for Cultural Affairs will, upon application, fix a rate of royalty according to the "ordinary rate". This provision has not apparently been much used, due to the administrative balkiness of the rate-setting process, but it suggests that compulsory licenses are not categorically rejected under Berne. Copyright Law of Japan, Art. 67 (available at <[http://www.cric.or.jp/cric\\_e/clj/clj.html](http://www.cric.or.jp/cric_e/clj/clj.html)>).

<sup>194</sup> Berne, Art. 6*bis*(1).

<sup>195</sup> *Id.*

<sup>196</sup> Berne, Art. 6*bis*(2).

It must be noted that since acceding to the Berne Convention, the United States has refused to fully incorporate into its domestic law the moral rights set out in Article 6*bis*. Instead, the U.S. has relied on a number of different sources, including an author's right under copyright law to control derivative works, state unfair competition, defamation, and privacy law, and the Visual Artists Rights Act (VARA), a 1990 amendment to the copyright law granting limited rights of paternity and integrity to a narrowly-defined class of "works of visual art,"<sup>197</sup> to approximate the Berne requirements. Whether the U.S. currently complies with Berne Article 6*bis* is a subject beyond the scope of this article.<sup>198</sup> But clearly current U.S. law, if it complies at all, does so only minimally. The question is whether subjecting certain works to the compulsory licenses that attend new-style formalities would subtract meaningfully from a level of protection for paternity and integrity rights that is already stinting. If so, then the U.S. may fall out of compliance with Article 6*bis* (or, perhaps, make its continued noncompliance no longer tolerable).

Some help in analyzing these questions can be found in Berne Article 9(2), which defines the conditions under which exceptions, such as compulsory licenses, can be made to the exclusive reproduction right. Article 9(2) permits exceptions to the reproduction right in certain "special cases", provided that the excepted reproduction "does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."<sup>199</sup>

According to the WIPO guide to the Convention, the permitted exceptions are subject in all cases to respect for the author's moral rights;<sup>200</sup> that much is evident from Article 9(2)'s three-step test, which mixes economic and moral rights concerns. Berne

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<sup>197</sup> 17 U.S.C. 106A. As Professor Goldstein notes, the moral rights granted under VARA extend to a small number of valuable works that exist only in a single copy or that are published in signed and numbered editions of no more than 200 copies, and are subject to limitations that "exempt[ ] from liability virtually all significant commercial uses of artistic works." See *id.* at 101, 106A(c)(3); PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE 284 (Oxford, 2001).

<sup>198</sup> For a compelling argument that the U.S. has failed to comply with the Berne standards for moral rights, see John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 *Hastings L.J.* 1023 (1976).

<sup>199</sup> Article 13 of the TRIPs Agreement applies the test from Article 9(2) of Berne for exceptions from the exclusive right of reproduction to all exclusive rights in literary and artistic works (e.g., the right to create derivative works, to authorize public performances, and to authorize broadcasts).<sup>199</sup> TRIPs Article 13 provides that: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the interests of the right holder."

<sup>200</sup> WIPO Guide to the Berne Convention, *supra* note \_\_\_\_, at 53.

nations may prescribe limitations, such as a compulsory license, on a copyright owner's exclusive rights only if three conditions are fulfilled, namely that:

- the limitations concern only “special cases” and are not generalized,
- the limitations do not conflict with the normal exploitation of the work,
- the limitations do not unreasonably prejudice the legitimate interests of the author.

These criteria for restricting exclusive rights must all be met in order for restrictions to be permissible.

Would the compulsory licenses involved in a system of new-style formalities pass the Article 9(2) test? Whether the compulsory licenses that attend new-style formalities fulfill the first requirement (i.e., that the limitation may only apply in “special cases”) is difficult to determine with certainty. For the reasons outlined above, we would expect a large number of authors to fail to comply with registration and notice requirements, and, similarly, the majority of rightsholders to fail to comply with a renewal formality. Accordingly, a large number of works (in both absolute and percentage terms) will be exposed to compulsory licenses in a system of new-style formalities.

That said, there is a strong argument that the type of license involved in a system of new-style formalities is not properly characterized as an exception or limitation to an author's exclusive rights in the way an ordinary compulsory license is. Unlike an ordinary compulsory license, the license involved in enforcing new-style formalities does not apply to any particular “class” of works, and, indeed, whether such a license applies at all is within the control of the rightsholder—i.e., the license only applies when the author or rightsholder sends a signal that he does not believe that his work has any significant commercial value—i.e., that he prefers the license. The license is, in that sense, not properly referred to as “compulsory”. Nonetheless, the status of new-style formalities under the first element of the Article 9(2) test remains unclear: although new-style formalities lead to the application of a non-negotiated license only where compliance with a formality will return less than reliance on the license, the scheme does require all authors to affirmatively “opt in” to protection.

The second element, which is tied to the author's economic right (i.e., to the “exploitation” of the work), is easier to analyze. Whether an exclusive license conflicts with the “normal exploitation” of a work depends on the value of the work in the absence of the compulsory license, versus the revenues collectible under the compulsory license. As outlined above, the compulsory license would apply only when a rightsholder fails to comply with a low-cost formality. Failure to comply is a signal that the net present value of expected future revenues from the work is less than the cost of compliance. The fee payable under the compulsory license is set to approximate the cost of compliance. Thus, for works that fall under the compulsory license, on average the rightsholder's ability to “exploit” the work will be, if anything, enhanced.

The argument that new-style formalities will not impair rightsholders' ability to exploit their works finds powerful analogical support in the fair use doctrine, which often

has been characterized as a limitation on exclusive rights that immunizes uses for which the transaction costs of negotiating a license exceed the potential return to rightsholders from the license.<sup>201</sup> Articles 10 and 10*bis* of the Berne Convention list certain fair use-type exceptions to the exclusive reproduction right—these include limited rights to make quotations<sup>202</sup> and to use works in aid of teaching<sup>203</sup> and news reporting.<sup>204</sup> Berne’s provision for fair use shows that the Convention is not indiscriminately hostile to exceptions to authors’ exclusive rights, but permits incursions when transaction costs make negotiated arrangements too costly. The compulsory licenses that back new-style formalities can be supported on the same grounds.

The third requirement—that an exempted reproduction “not unreasonably prejudice the legitimate interests of the author”—is susceptible, at least in part, to the same analysis. To the extent that the author’s “legitimate interests” are taken to mean his ability to capture whatever rents his exclusive rights will return, the compulsory license does not interfere. To the extent, however, that the phrase “legitimate interests” refers to the author’s moral rights, additional analysis is required.

Berne signatories are required to establish and protect paternity and integrity rights. Assuming that the U.S. has done so, a scheme of new-style formalities need not touch these rights at all: although the works of non-compliant rightsholders are subject to compulsory licensing, the copyrights on works affected by the regime are nonetheless left formally intact. Accordingly, there is no reason why the law could not specify that use of works under the compulsory licenses is subject, in all cases, to whatever (narrow) protection current U.S. law affords to paternity and integrity rights.

But new-style formalities could go further, in a way that would strengthen the United States’ commitment to facilitating the exercise of Berne-mandated moral rights. One method would be to infuse into new-style formalities the type of “some rights reserved” copyright customization that Creative Commons provides now.<sup>205</sup> New-style registration, notice, recordation of transfers, and renewal could be designed to allow rightsholders to signal exactly which rights they wish to retain, and which freedoms are allowed. The difference is that instead of relying on a Creative Commons license, rightsholders’ choices about which rights to reserve would be enforceable as a matter of positive law.

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<sup>201</sup> See generally PAUL GOLDSTEIN, 2 COPYRIGHT chap. 10 (2d ed. 1996).

<sup>202</sup> Berne Art. 10(1).

<sup>203</sup> Berne Art. 10(2).

<sup>204</sup> Berne Art 10*bis*(2).

<sup>205</sup> See *supra* at text accompanying notes \_\_\_\_.

There are two potential advantages of the integration of new-style formalities with the Creative Commons approach. First, it could be used to strengthen U.S. compliance with Berne-mandated moral rights. Authors who comply with new-style formalities could be permitted, in exchange for a blanket grant of permission to use their works, to demand attribution in all cases, even in instances, such as fair use, where the rightsholder would not currently have the power to enforce such a demand. Similarly, authors who comply with new-style formalities would be able to protect their integrity rights, by permitting reproduction but restricting derivative uses.<sup>206</sup>

The second advantage is normative—by disaggregating economic from moral rights, and the moral rights of paternity and integrity from one another, new-style registration, notice, recordation and renewal would allow us to understand over time what people want in terms of rights for different types of works, and how those desires change (if they do at all). That information would be useful in the debate over future changes to the copyright laws.

[INSERT CC GRAPHIC RE: LICENSE DISTRIBUTION]

The data set out in Figure 4, which was provided by Creative Commons, shows the choices that Creative Commons licensors have made over the first two years of the organization's existence regarding which rights to reserve, and which to give away. Although rightsholders who seek out, or become informed about, Creative Commons and decide to enter into a Creative Commons license are certainly not representative of rightsholders as a broader group, the Creative Commons license distribution data gives us some insight into what the world might look like where copyright is no longer an on/off switch, but is more finely variegated.

Perhaps most unexpectedly, the data show that a significant majority (67%) of Creative Commons licensors allow the use of their content in the creation of derivative works. These data suggests that many rightsholders would voluntarily abandon control over derivative works, which is an element both of the author's economic right and his right of integrity—although most who do so (again, 67%) would limit use to non-commercial derivative works.

In contrast, the Creative Commons data show that almost all licensees—97%—require attribution in exchange for permission to use their works. That number suggests that the norm favoring attribution is strong, and, consequently, we may succeed in moving copyright closer to rightsholders' expectations and simultaneously free a large amount of creative work if we install a mechanism for exchanging the right to control reproduction for a stronger commitment to provide attribution.

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<sup>206</sup> This bolstering of the integrity right is limited of course, by the demands of the First Amendment. Any attempt to limit parody or criticism through a restriction on derivative works should be repelled by the fair use doctrine.



#### **IV. CONCLUSION**

My initial hope, in writing this article, was that the reformatization of copyright—a task that could be accomplished, I believe, with a few manageable changes to the international and domestic law, and without endangering the interests of any particular segment of the copyright community—might reduce the current friction over copyright to a level conducive to a broader discussion about intellectual property reform. Having delved further into the arguments for reformatization, and for how to do it, I retain that hope. The challenge now, for those more attuned than I to political possibilities and limitations, is to formulate a plan for turning academic arguments for copyright reformatization into changes to international and domestic laws.